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## Tensions in Cuban Property Law

Steven E. Hendrix

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# Tensions in Cuban Property Law

By STEVEN E. HENDRIX\*

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## I. Introduction

### A. *Cuba in Today's Policy Debate*

Cuba, located ninety miles off the coast of Florida,<sup>1</sup> is the only Communist country in the Western Hemisphere.<sup>2</sup> It captivates the imagination of international policymakers as they try to predict what will

1. Trevor R. Jefferies, *The Cuban Democracy Act of 1992: A Rotten Carrot and a Broken Stick?*, 16 Hous. J. INT'L L. 75, 76 (1993).

2. Paul Bernstein, *Cuba: Last Look at an Alternative Legal System?*, 7 TEMP. INT'L & COMP. L.J. 191, 191 (1993) (stating that "Yankee pundits point to Cuba as the last bastion of communism").

happen when Castro "falls" and when that might be.<sup>3</sup> Former land-owners seek to recover lost assets, or at least some measure of indemnification.<sup>4</sup> Development experts strategize ways to invigorate the country's moribund economy.<sup>5</sup> Pharmaceutical companies await privatizations.<sup>6</sup> Cuba's future depends, in part, on whatever changes take place in Cuba's government. Cuba's future also depends, in part, on existing law and current legal reforms. Perhaps foremost among the current reforms being debated are the roles of tenure policy and property law.

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3. Tad Thompson, *Agriculture Key to Cuba's Future*, 4 INT'L PRODUCE J. 35, 35 (1995); INTERNATIONAL REPUBLICAN INSTITUTE, CUBA TRANSITION RESOURCE GUIDE (1995); Marifeli Pérez, *The Field of Cuban Studies*, 26 LATIN AM. RESOURCE GUIDE 239, 239-40 (1991) (noting that "[t]he Cuban Revolution never fails to arouse controversy. A great schism divides its discussion: paradise or hell, progress or ruin, democracy or tyranny. Intellectual discourse on Cuba is rarely just about scholarship . . ."). See *Castro Takes One More Step Toward Capitalism*, ECONOMIST, Sept. 9, 1995, at 45 (asking "if China's leaders are finding it increasingly hard to keep capitalist economies out of communist politics, how long can Cuba's?"). Furthermore, according to press accounts, notable recent visitors to Cuba investigating investment opportunities include billionaire John Kluge, Ted Turner of CNN, and Robert Wright, NBC President. See Hugh Davies, *Bankrupt Castro Yields to Capitalism*, DAILY TELEGRAPH, Sept. 8, 1995, at 14.

4. See, e.g., Rosalind Resnick, *Bringing the Law Back Home: Cuban Exiles Prepare For the Day Castro Falls*, NAT'L L.J., June 28, 1993, at 1, 35.

5. The U.S. Agency for International Development, for example, created a Cuba Task Force in 1995 to study potential scenarios in any "Free Cuba." In the past year, representatives of the International Monetary Fund (IMF) met with Cuban officials to discuss how the IMF and World Bank could help the economy make a transition from communism's central planning. See Suzanne Bilello, *U.S. Companies Look Again to Cuba*, NEWSDAY, Feb. 20, 1994, at 106. Reportedly, a confidential report issued after a November IMF visit criticized the embargo. *Id.*

6. The pharmaceutical and tourism sectors are the two main areas in which letters of intent have been signed with the Cuban government to undertake new investments once the embargo is lifted. See Michael Becker, *Cuba Woos 'Top' U.S. Firms Eager to Invest*, MIAMI HERALD, Apr. 11, 1995, at A6. After developing a number of vaccines and medicines Cuba's biotechnology industry has attracted the attention of several major drug companies. *Id.* Observers see pharmaceutical companies making a big push to provide medical supplies in Cuba. See Mary Romano, *Growing Number of U.S. Companies Prepare for Future Business With Cuba*, WALL ST. J., Dec. 23, 1994, at B5. Both Merck & Co. and Johnson & Johnson have said that they have visited the island. *Id.* According to a company spokesperson, Eli Lilly & Co. has recently made a \$1.7 million donation of insulin and antibiotics to Cuba, and contributed \$1.2 million in a previous donation in January. *Id.* The United States permits these types of humanitarian donations. *Id.* Furthermore, in October 1995, 60 top U.S. corporate executives flew to Cuba on a fact finding visit. *U.S. Executives Head for Cuba*, FIN. TIMES, Oct. 7, 1995, at 3. The executives, representing more than 40 major U.S. business corporations, attended a dinner with Fidel Castro and questioned him about politics, economics, and his own personal views. World News Highlights, European Community Report, Reuters, Oct. 7, 1995, available in LEXIS, News Library, Reuec File.

Cuba's relationship with the United States has been long and tumultuous. In response to the expropriation of more than US\$1.8 billion worth of U.S. property in Cuba, President John F. Kennedy imposed a trade embargo on Cuba on February 6, 1962.<sup>7</sup> In enacting the embargo, President Kennedy relied on the Foreign Assistance Act of 1961 that deals specifically with the restitution of confiscated property.<sup>8</sup> This property confiscated by Cuba over thirty years ago is now valued at close to US\$6 billion.<sup>9</sup>

In a major change in Cuban policy, foreign investment in Cuba has recently been welcomed.<sup>10</sup> Over the past two or three years, foreign investment in tourism, mining, and, most recently, agriculture have begun to increase.<sup>11</sup> Canadian entrepreneurs in particular have begun massive investments in Cuba, especially in the oil and mineral sector.<sup>12</sup> In 1994, Cuba's first large-scale privatization since 1959 resulted in a \$1.4 billion investment by Domos International, a Mexican investment group.<sup>13</sup> In this venture, the group agreed to renovate Cuba's telephone system in exchange for a forty-nine percent share in the state telecommunications concern, ETEC.<sup>14</sup> That same year, investment groups in Israel and Chile began investing in Cuban citrus

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7. Jason S. Bell, Comment, *Violation of International Law and Doomed U.S. Policy: An Analysis of the Cuban Democracy Act*, 25 U. MIAMI INTER-AM. L. REV. 77, 81 (1993).

8. Tom Carter, *Cuba Unlikely To Be Next Trading Partner for U.S.*, WASH. TIMES, Feb. 23, 1994, at A10.

9. *Hearing on Free Trade with Cuba Act Before the Subcomm. on Select Revenue Measures and Trade of the House Comm. On Ways and Means*, 103rd Cong., 2nd Sess. 47 (Mar. 17, 1994) (testimony of Robert Menendez, New Jersey Congressman).

10. Cuban Decree No. 50, promulgated in 1982, allowed for foreign capital investment in Cuba. See Victor Figueroa Albelo, *La Reforma Económica en Cuba y Sus Direcciones Principales*, CONTRAPUNTO, May 1995, at 41. This policy was ratified by Party Resolution in 1991. *Id.* A London-based investment manager is planning to create a \$50 million fund to immediately start investing in Cuba. See *London-Based Fund Plans to Invest in Cuba*, MIAMI HERALD, Oct. 24, 1994, at C1. Beta Funds Ltd., which already manages funds for Vietnam and Poland, has set up what it claims is the first foreign investment management company on the island, Havana Asset Management. *Id.*

11. William A. Messina, Jr., Presentation at the Library of Congress in Washington D.C. (May 17, 1995) (presentation by Mr. Messina, the Executive Coordinator of International Agricultural Trade and Development Center at the University of Florida's Institute of Food and Agricultural Sciences) (notes from presentation on file with author) [hereinafter Messina Presentation]. For a discussion of private restaurants in Cuba, see Douglas Farah, *Cuba's Revolutionary Restaurants: Private Eateries, Catering to Local Clientele, Are Faring Well*, WASH. POST, Sept. 15, 1995, at A28.

12. Peter Benesh, *Canadian Trade with Cuba Growing: U.S. Embargo is Helping by Pushing Business Opportunities North*, STAR TRIBUNE, Aug. 16, 1993, at 8D.

13. Noll Scott, *Informality Belies the Castro Message*, GUARDIAN, Jun. 17, 1994, at 13.

14. Sarah Cameron, *Cuba*, 1995 BRITANNICA BOOK OF THE YEAR 397, 398 (1995).

productions.<sup>15</sup> Because of this foreign investment, Cuba has improved both the quality and the timing of its citrus production and is competing commercially with Florida in places such as Europe and Japan.<sup>16</sup>

In the agricultural sector, several foreign groups have provided investments. For example, investment groups from Spain and Greece have formed a consortium to invest in citrus.<sup>17</sup> Canadian and French investment groups are investing in sugar, and the Spanish are investing in Cuban tobacco production.<sup>18</sup> Canadians are very much involved in petroleum sector investments.<sup>19</sup> There are currently 212 joint venture enterprises for foreign investment.<sup>20</sup> Nevertheless, analysts suggest that export volumes from these investments will not have any substantial effect on the general foreign exchange picture, because most of the foreign investment has been funneled toward production rather than hard assets.<sup>21</sup> This uneven investment is fueled by investor concerns regarding the high risk of expropriation in Cuba.<sup>22</sup>

Other communist countries have made the transition to private land ownership. For example, in Eastern Europe, little analysis of the property question was carried out before the changes in government. When the changes came, they took donor agencies and host governments by surprise, leaving no established strategy for addressing tenure issues. While substantial literature exists regarding privatization and resolution of American claims against Cuba for expropriation of property, most of it is of an advocacy nature rather than objective. Little else on general development strategies or tenure policy exists.

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15. Larry Luxner, *Israelis Invest in Citrus Operation*, THE PACKER, Dec. 25, 1995, at 6C.

16. Messina Presentation, *supra* note 11. The Israeli investment is a joint venture with the largest state citrus enterprise, "Jaguey Grante," covering 40,000 hectares. See *Hearing on Agricultural Implications of Renewed Trade with Cuba Before the Subcomm. on Foreign Agriculture and Hunger Comm. on Agriculture*, 103rd Cong., 2nd Sess. 8, 10 (May 19, 1994) (testimony of Carmen Diana Deere, Professor of Economics and Director of the Latin American Studies Program at University of Massachusetts, Amherst) [hereinafter Deere Testimony]. This is a \$22 million operation. *Id.*

17. *Castro Says Approval of Investments Will Be 'Flexible' but Subject to Scrutiny*, BBC SUMMARY OF WORLD BROADCASTS, Sept. 6, 1995, available in LEXIS, News Library, Bbcwb File.

18. Messina Presentation, *supra* note 11.

19. *Id.*

20. See Peter Benesh, *Canadians Profit from Connection with Cuba*, ST. PETERSBURG TIMES, Sept. 12, 1993, at I1. Canadian oil and gas companies are helping Cubans find their own sources of energy and providing the technology for Cuba to refine the sulfur-laden "heavy" oil it does have. *Id.*

21. Messina Presentation, *supra* note 11.

22. *Id.*

This Article seeks to address property ownership from a broader, objective view, providing a panorama of property law in Cuba that includes a general discussion of agrarian reform, property registries, and the property claims dispute with the United States. The Article then discusses possible issues that Cuba will need to resolve. The Article does not attempt to lay out a "master plan" for property in Cuba<sup>23</sup> or to record a history of expropriations and their possible resolution.<sup>24</sup> Instead, it attempts to summarize the past and present state of Cuban property law and flag issues that the Cuban government should address in reforming this system. How these issues are resolved will be a matter of participatory negotiation and diplomacy, both within Cuba and internationally. It is hoped that this Article will contribute to this discussion and provide the information base needed to begin that process.

### ***B. Property as a Key Constraint and the Key Tool to Development***

Land policy is directly related to the goals of private investors. These concerns include broadly based economic growth, the global environment, democracy, food and disaster assistance, and the stabilization of world population growth.<sup>25</sup> Consequently, tenure policy reform is a critical element in economic revitalization. Mark Schneider, the Assistant Administrator for Latin America at the U.S. Agency for International Development (USAID), has argued unequivocally:

One only has to look at the tragedy of events in Chiapas [Mexico] to illustrate the gravity of failing to address land security for the poor. There are also few issues as potentially destructive to our hopes for consolidating democracy and achieving sustainable development than the denial of access to land and property rights for the poor. . . . Formalizing land ownership gives a sense of purpose, a stake in society and a seat in the community council. It also is the key to unlocking the door to rural credit, to new technology and to

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23. In proposing reforms in the British constitution, the Economist explained that "[o]ur goal is not to write a blueprint. That would be to side with angry uncompromisers bearing final solutions. It is, rather, to show that Britain's constitution does need repairing, and to offer some ideas for putting it right." *Reclaiming Britain's Constitution*, *ECONOMIST*, Oct. 14, 1995, at 18. This Article seeks to accomplish the same by offering suggestions for "repairing" Cuba's legal structure.

24. This topic is handled skillfully elsewhere. See, e.g., Matias F. Travieso-Díaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals' Expropriation Claims Against Cuba*, 16 U. PA. J. INT'L BUS. L. 217, 220 (1995).

25. See generally Steven E. Hendrix, *Tenure*, LAC TECH BULLETIN (USAID Agriculture and Rural Development Technical Services (LAC TECH) project), Sept. 1994 at 1, 2.

the infrastructure for rural development. . . . USAID is pledged . . . to promote land security for the poor . . . .<sup>26</sup>

The agriculture sector is critical to the health of the Cuban economy. Until 1989, eighty-five percent of foreign exchange was generated by the agriculture sector.<sup>27</sup> In 1995, at least eighty percent of foreign exchange was generated in agriculture, while tourism contributed about ten percent.<sup>28</sup> Consequently, agriculture and tenure policy continue to be intimately related to general macroeconomic performance in Cuba.

Cuba maintains a large, affluent exile community in Miami. As a result, Cuba enjoys much greater economic strength than, for example, Nicaragua.<sup>29</sup> This may translate into greater potential for privatization or investment should there be a change in policy between Havana and Washington.<sup>30</sup> New foreign investment industries may also contribute if conditions are favorable. However, such investment would have to be predicated on reassurances of private property rights.<sup>31</sup>

## II. Cuban Property Law

### A. *Constitutional and Civil Code Provisions*

#### 1. *Historical Perspective: The Roots of Current Cuban Property Law*

The original Cuban Constitution dates from 1901,<sup>32</sup> and contains a strong provision on protection of private property. "No one shall be

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26. Mark Schneider, Presentation at the conference, Property for the Poor: The Path to Development in Washington, D.C. (Apr. 12, 1994) (presentation by Mr. Schneider, Assistant Administrator for Latin America at USAID) (notes from presentation on file with author) [hereinafter Schneider Presentation]. The reference to Chiapas relates to a peasant uprising in southern Mexico that began on January 1, 1994. *Id.* Two of the main issues in that uprising were land rights and inequitable land distribution in the state of Chiapas. *Id.*

27. Messina Presentation, *supra* note 11.

28. *Id.*

29. David Willig, Presentation at the Organization of American States in Washington, D.C. (Sept. 18, 1992) (notes from presentation on file with author) [hereinafter Willig Presentation].

30. *Id.*

31. *Id.*

32. More technically, there were several "Cuban Constitutions" while the Spanish still controlled the island. However, this legal history is beyond the scope of this Article. Readers interested in earlier constitutional and quasi-constitutional arrangements should refer to William T. D'Zurilla, Comment, *Cuba's 1976 Constitution and the Fidelista Interpretation of Cuban Constitutional History*, 55 TULANE L. REV. 1223, 1225-32 (1981).



deprived of his property, except by competent authority, upon proof that the condemnation is required by public utility, and previous indemnification. If the indemnification is not previously paid, the courts shall protect the owners and, if needed, restore to them the property."<sup>33</sup>

As Cuban governments haphazardly enforced the 1901 Constitution with increasing inconsistency, observers in both Cuba and the United States began to doubt the existence of any legitimate constitutional rule.<sup>34</sup> Despite improvements in Cuba's standard of living during this period, political instability hindered socioeconomic advances and "created a sense of dissatisfaction with the overall status of individual rights on the island."<sup>35</sup> During the 1920s and 1930s, a period of considerable turmoil, political and academic leaders began to debate how to create a national, social, and economic commitment.<sup>36</sup> These political and academic leaders "created popular support for the creation of a new constitution that would reflect the progressive values of its citizens."<sup>37</sup>

Between 1934 and 1940, Fulgencio Batista y Zaldívar was in command of the Army and effectively ruled the country.<sup>38</sup> He overpowered a series of politically weak presidents whom he replaced whenever they refused to agree with his recommendations.<sup>39</sup> In 1939, Batista attempted to improve Cuban relations with the international community by allowing Cubans to elect delegates for a new constitutional assembly "that would consolidate and formalize the gains the revolutionary government achieved."<sup>40</sup> The people of Cuba challenged Batista to implement a new constitution; in response, after winning the Cuban presidency he promulgated a new constitution on July 5, 1940.<sup>41</sup> From 1940 to 1944, Batista served as a constitutionally elected president. The new constitution required a lapse of eight years before a president could seek a second term, so Batista did not

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33. See Travieso-Díaz, *supra* note 24, at 228 (quoting and discussing CONSTITUCIÓN DE 1901 art. 32 (Cuba) [hereinafter 1901 CONSTITUTION]).

34. *Id.*

35. Jonathan Wachs, Comment, *Reviving the 1940 Cuban Constitution: Arguments for Social and Economic Rights in a Post-Castro Government*, 10 AM. U. J. INT'L L. & POL'Y 525, 540 (1994).

36. *Id.*

37. *Id.*

38. MARIO LAZO, AMERICAN POLICY FAILURES IN CUBA: DAGGER IN THE HEART! 59 (1968).

39. Wachs, *supra* note 35, at 543.

40. *Id.* at 542-43.

41. *Id.* at 543.

run for re-election in 1944.<sup>42</sup> Between 1944 and 1948 Grau San Martín, considered the most incompetent and corrupt president in Cuban history, served as president.<sup>43</sup> This period was followed by the presidency of Carlos Prío Socarrás from 1948 to 1952, which was also marked by financial scandals.<sup>44</sup> After being out of office for eight years, Batista returned to power illegally and held it illegally until he was constitutionally elected in 1954 as the only candidate.<sup>45</sup> He remained President of Cuba until replaced by Fidel Castro on January 1, 1959.<sup>46</sup>

Batista's November 1939 decision to hold elections for a constitutional convention greatly enhanced his popularity.<sup>47</sup> Since 1940, Cuba has had four constitutions: the 1940 Constitution, the 1959 Fundamental Law, the 1976 Constitution, and the 1992 Constitution.

Social and economic guarantees are prominent in the provisions of the 1940 Constitution.<sup>48</sup> Of the 286 articles, 61 dealt with social and economic issues.<sup>49</sup> Several provisions from the 1940 Constitution<sup>50</sup> addressed property concerns, including Article 24 of the 1940 Constitution which prohibited confiscations of property.<sup>51</sup> That provision stated:

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42. LAZO, *supra* note 38, at 79.

43. *Id.* at 80.

44. *Id.* at 84.

45. *Id.* at 92.

46. *Id.*

47. *Id.* at 73.

48. See Arturo Fournier F., *El Nuevo Derecho Agrario en Cuba*, 31 REVISTA DE CIENCIAS JURÍDICAS 72, 73 (1977) (citing CONSTITUCIÓN DE 1940 (G.O. No. 464, July 8, 1940) (Cuba) [hereinafter 1940 CONSTITUTION]). See also Wachs, *supra* note 35, at 543 (discussing these provisions).

49. LAZO, *supra* note 38, at 74.

50. See Fournier F., *supra* note 48, at 73.

51. *Id.* (quoting 1940 CONSTITUTION art. 24) (translation by author). By definition, confiscation is the taking back of property gained from an illicit activity, while expropriation is the taking of property for a public purpose with indemnification. The use of the word "confiscation" is significant. Unlike the word "expropriation," confiscation implies that the former owner will not be compensated, because the property being taken was illegally acquired. Cuba has often been compared to Nicaragua in terms of confiscated assets. Nicaraguan Sandinista reform of property law began July 19, 1979 with the confiscation of property belonging to Somoza. Steven E. Hendrix, *Property Law Innovation in Latin America with Recommendations*, 18 B.C. INT'L & COMP. L. REV. 1, 17 (1995).

Presumably, the property was acquired illegally and was simply being returned to its rightful owners. See Decreto No. 172 (1979) (Nicar.). One law, signed by Daniel Ortega S. and Violeta B. de Chamorro, among others, authorized the *Procurador General de Justicia* (the Attorney General) to confiscate all goods belonging to Somoza's family, military officials, and other functionaries that were abandoned in the country after December, 1977. Decreto No. 3 (1977) (Nicar.) [hereinafter Decree No. 3]. The Attorney General's confis-

Confiscation of property is prohibited. No one can be deprived of their property except by competent judicial authority and for the justified cause of public or social utility, and always after payment of the corresponding indemnification in cash, as judicially determined. Non-compliance with these requirements will not change the right of the individual whose property has been expropriated to be protected by the courts, and, if the case so requires, to have their property restored.

The reality of the cause of public utility or social interest, and the necessity for expropriation, will be decided by the courts in case of a challenge.<sup>52</sup>

Article 87 of the 1940 Constitution recognized the existence of private property within the broader framework of a "social function" of land.<sup>53</sup> This Article acknowledges the fact that Latin American countries generally recognize a social function for land, as distinct from the concept of land as strictly an economic resource.<sup>54</sup> This social function is considered a fundamental aspect of Latin American

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cation powers were extended to goods belonging to *personas allegadas* (the followers) of Somoza. Decreto No. 38 (1979) (Nicar.) [hereinafter Decree No. 38]. This decree was also signed by Daniel Ortega, Violeta B. de Chamorro, and others. Decree No. 38 was later suspended as of August 8, 1979. The vague wording of this decree, allowing for confiscation of property from any "follower" of Somoza, may have lead to much abuse.

52. *Id.* This Article of the Constitution provides the following:

La confiscación de la propiedad está prohibida. Ninguno puede ser privado de la suya a menos que sea por autoridad judicial competente y por causa justificada de utilidad pública o social, y siempre previo pago de la indemnización correspondiente en efectivo, fijada judicialmente. El no cumplimiento de estos requisitos no determinará el derecho de la persona cuya propiedad ha sido expropiada, a ser protegido por las cortes, y, si el caso así lo demandar, a tener restituída su propiedad.

La realidad de la causa de utilidad pública o interés social, y la necesidad de expropiación, serán decididos por las cortes en caso de impugnación.

*Id.* Compare this provision with Article 106 of the Constitution of El Salvador. CONSTITUCIÓN art. 106 (El Sal.) (1983) available in <<http://www.georgetown.edu/LatAmerPolitical/constitutions>> (prohibiting confiscation, permitting expropriation for public utility or social interest, and underscoring the need for compensation for such government actions). However, the Constitution of El Salvador limits properties to 245 hectares and requires that properties comply with the social function. *Id.* art. 105.

53. LEONELLO CHIUMINATTO C., LEY DE REFORMA AGRARIA EN CUBA Y EL PROYECTO DE LEY CHILENO 34-35 (1964) (quoting the 1940 CONSTITUTION art. 87). The 1940 Constitution was heavily influenced by the 1917 Mexican Constitution, the 1918 German (Weimar) Constitution, and the 1931 Spanish Constitution. See D'Zurilla, *supra* note 32, at 1237. For a general discussion of the Mexican Constitution's approach to the social function of land, agrarian reform, and expropriations, see Hendrix, *supra* note 51, at 27-38. For a discussion of the German and Spanish Constitutions in relation to the social function of land, see *id.* at 8 n.41.

54. See Hendrix, *supra* note 51, at 7-8 (describing constitutional provisions across Latin America and the Caribbean).

constitutional law,<sup>55</sup> and is found in standard Latin American jurisprudence and doctrine.<sup>56</sup> It embodies a national struggle against large estates and feudalistic land distribution, and envisions an agrarian policy in favor of the resource poor.<sup>57</sup> Defining land in terms of its social function implies that the person who personally and directly works the land owns it.<sup>58</sup>

Article 90 of the 1940 Constitution allowed for size restrictions against large farms and against foreign ownership of land.<sup>59</sup> It stated:

Large estates are illegal and to effect their elimination, the Law will set forth the maximum expanse of property that each person or entity can possess (for each type of use that land is dedicated to, taking into account respective peculiarities).

The Law will restrictively limit the acquisition and possession of land by persons and foreign companies and adopt measures that require the land to revert to Cubans.<sup>60</sup>

55. For an introduction to the social function of land and relevant Civil Code doctrine, see RAMON VICENTE CASANOVA, *DERECHO AGRARIO* 37-48 (1990).

56. This is the concept of "land to the tiller" or "*tierra a quien la trabaja*" found in many jurisdictions. See, e.g., CONSTITUCIÓN arts. 165, 166 (Bol.).

57. *Id.* See also Ley de Reforma Urbana whereas cl. 1 (G.O., Oct. 14, 1960) (Cuba) (extending the social function of land to housing) [hereinafter Urban Reform Law]. Interestingly, the NAFTA-era amendment to Article 27 of the Mexican Constitution also prohibits large estates. See CONSTITUCIÓN tit. I, art. 1, § 27 (Mex.).

58. However, this owner is distinct from the documentary owner, who ceases to own the land if his or her use does not conform to the social function. This concept is codified in the current Cuban Constitution. CONSTITUCIÓN DE 1992 art. 24 (Cuba) available in <<http://www.georgetown.edu/LatAmerPolitical/constitutions>> [hereinafter 1992 CONSTITUTION].

59. See Cratilio R. Navarrete Acevedo, *Apuntes Sobre Derecho Agrario Cubano* 77 (1984) (unpublished manuscript on file with the Land Tenure Center Library, University of Wisconsin) (quoting and discussing 1940 CONSTITUTION art. 90); see also CHIUMINATTO C., *supra* note 53, at 35 (same). Such restrictions against *latifundia*, or large estates, are very common in Latin America. See Hendrix, *supra* note 51, at 7-11. Furthermore, in places like Peru, which have recently enacted legislation aimed at encouraging foreign investment, some restrictions remain. *Id.* at 25.

60. See Navarrete Acevedo, *supra* note 59, at 76-77 (quoting 1940 CONSTITUTION art. 90) (translation by author). Article 90 of the Constitution provides the following:

Se proscribe el latifundio y a los efectos de su desaparición la Ley señalará el máximo de extensión de la propiedad que cada persona o entidad pueda poseer (para cada tipo de explotación a que la tierra se dedique y tomando en cuenta las respectivas peculiaridades).

La Ley limitará restrictivamente la adquisición y posesión de la tierra por personas y compañías extranjeras y adoptará medidas que tienen a revertir la tierra al cubano.

*Id.*; see also ORLANDO VALDÉS GARCÍA, *LA SOCIALIZACIÓN DE LA TIERRA EN CUBA* 4 (1990) (discussing this provision) [hereinafter VALDÉS GARCÍA, *SOCIALIZACIÓN*]. Fidel Castro noted Article 90 in his famous speech entitled "La historia me absolverá" ("History will absolve me") in which he stated that the new revolutionary government would transfer

Article 91 of the 1940 Constitution permitted the paternal family head who occupied, cultivated, and directly exploited a farm of 2000 pesos or less to declare the land "irrevocable family property."<sup>61</sup> Other provisions in the 1940 Constitution required the nation to "employ the resources within its reach to furnish employment to everyone who lacks it" and to assure workers "the economic conditions necessary to a fulfilling existence."<sup>62</sup>

Before 1959, Article 349 of the Civil Code contemplated expropriation of privately-owned property, provided there was prior indemnification and the property was for a "public use."<sup>63</sup> For example, in 1958, the rebel movement promulgated Law Number 3, the first revolutionary piece of agrarian legislation.<sup>64</sup> That legislation allowed occupants of up to two *caballerías* of land to become owners of that land without payment.<sup>65</sup> The State then promised indemnification to the former owners.<sup>66</sup> Where there was a group of occupants possessing between two and five *caballerías*, the occupants could receive the first two *caballerías* free, and then demand the owner to sell the rest to the occupant, up to a maximum of five *caballerías*.<sup>67</sup> Law Number 3 also promulgated the following regulations: (a) forbade corporate ownership (except by a "matrimonial society" or married couple, or by an agrarian cooperative); (b) eliminated divisibility of land; (c) prohibited transfers of land except for inheritance, transfers of land to the state, trades authorized by the state, and public auctions in certain cases; (d) permitted inheritance by only a single heir (or to a community of heirs who would retain the property in indivisible form), or sale in a public auction; (e) limited auction participants to qualified agricultural workers or farmers, with rights of first refusal being granted to the state; and (f) promoted state financed agricultural credit.<sup>68</sup>

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lands to peasant occupants, paying indemnification to former owners equal to 10 years' rental payments. See *id.* at 5; Orlando Valdés García, *Antecedentes Jurídicos de la Revolución Agraria en Cuba*, 26 DERECHO Y REFORMA AGRARIA REVISTA 109, 109-110 (1995) [hereinafter Valdés García, *Antecedentes*].

61. See CHIUMINATTO C., *supra* note 53, at 35 (quoting 1940 CONSTITUTION art. 91).

62. See D'Zurilla, *supra* note 32, at 1228 (citing 1940 CONSTITUTION art. 60 and substituting the word "fulfilling" for the word "fitting" in the translation).

63. Willig Presentation, *supra* note 29.

64. See Navarrete Acevedo, *supra* note 59, at 82 (quoting Ley No. 3 (Oct. 10, 1958) (Cuba) [hereinafter Law No. 3]). As Law No. 3 was a rebel pronouncement, it was not printed in the official gazette. It is sometimes referred to as Ley No. 3 de la Sierra (Law No. 3 of the Mountains). See Fournier F., *supra* note 48, at 77.

65. Navarrete Acevedo, *supra* note 59, at 82. 1 *caballería* = 13.4 hectares = 33 acres.

66. *Id.*

67. *Id.*

68. *Id.* at 82-83.

On March 10, 1952, towards the end of Carlos Prío's term as President, Batista executed a military coup d'état.<sup>69</sup> On April 4, 1952, Batista's government issued a Constitutional Act that was to govern the country.<sup>70</sup> Nevertheless, at times throughout his tenure, constitutional guarantees were entirely suspended.<sup>71</sup> Batista's coup and the suspension of constitutional guarantees served to break the legal continuity of the political system that was created with the enactment of the 1940 Constitution.<sup>72</sup> In response, many opposition groups were established, including the 26th of July Movement, named after the assault led by Fidel Castro on the *Moncada* military barracks in the Cuban province of Oriente on July 26, 1953.<sup>73</sup> Because of Batista's suspension of all constitutional guarantees, restoration of the 1940 Constitution became a unifying goal among groups opposing Batista.<sup>74</sup>

Many Cubans viewed the creation of the 1940 Constitution as "one of the most distinguished moments in Cuban history."<sup>75</sup> Indeed, it marked an important step in Cuba's progress toward democracy, even though in practice it was never fully implemented.<sup>76</sup> It was the first Cuban national charter "created by a diverse representation of the population without any influence from a foreign nation."<sup>77</sup> However, to fully implement its provisions, the government was required to spend vast amounts of scarce financial resources. Cuban leaders found it difficult to honor constitutional guarantees while also promoting the prosperity of the nation.<sup>78</sup> Consequently, many leaders ignored these rights and Batista formally suspended the entire 1940 Constitution between 1952 and 1954.<sup>79</sup> As a result, administration of the relevant constitutional provisions was inconsistent; many Cubans believed their social and economic rights, at least while Batista was in power, were legitimate but unenforceable.<sup>80</sup> Indeed each of the three presidents between 1940 and 1952 (Batista, Grau San Martín, and Prío

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69. Ignacio E. Sanchez, *Cuban Property Rights and the 1940 Constitution*, 3 J. TRANS-NAT'L L. & POL'Y 135, 135 (1994).

70. *Id.* at 142.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Wachs, *supra* note 35, at 544.

76. LAZO, *supra* note 38, at 75.

77. Wachs, *supra* note 35, at 544.

78. *Id.*

79. *Id.*

80. *Id.*

Socarrás) violated provisions of the 1940 Constitution.<sup>81</sup> In particular, Grau openly flaunted his disregard for the constitution.<sup>82</sup>

One author suggests that the 1940 Constitution attempted to increase judicial independence by addressing the problem of presidential control over the appointment of justices.<sup>83</sup> However, the effort was not entirely successful because "the administration of justice continued to be subject to the problems and pressures arising from a patronage system and the general level of political morality."<sup>84</sup> The police did little to ameliorate this situation; although police were considered "reasonably efficient" in carrying out their regular police duties, they were "subjects of patronage and favoritism, especially where Havana's gambling and prostitution businesses were concerned."<sup>85</sup>

Unemployment and underemployment increased throughout the 1940s and 1950s.<sup>86</sup> By 1956 and 1957, the unemployment rate reached a combined total of about thirty percent of the labor force.<sup>87</sup> During the early 1950's, Fidel Castro, a young lawyer, ardent nationalist, and former student agitator, was extremely vocal in his hostility towards the Batista government. Castro's rise to popularity in the 1950s occurred largely because "he presented his movement to the Cuban people as the legitimate heir of the 1933 Revolution and the 1940 Constitution."<sup>88</sup> In a famous speech given to defend himself at trial for his assault on Batista's military barracks, Castro made an impassioned plea in favor of Cuba's social and economic goals.<sup>89</sup> After his rebel movement solidified several years later, Castro formally declared that his movement "foresees the establishment of an order in which all the inalienable rights of a human being—political, social, economic, and cultural—will be fully met and guaranteed."<sup>90</sup>

Castro became prominent in Cuba in 1958.<sup>91</sup> By 1957, the Cuban economy had reached record heights, while that same year a pro-Cas-

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81. LAZO, *supra* note 38, at 75.

82. *Id.*

83. Bernstein, *supra* note 2, at 193.

84. *Id.*

85. *Id.*

86. CARMELO MESA-LAGO, *THE LABOR FORCE, EMPLOYMENT, UNEMPLOYMENT, AND UNDEREMPLOYMENT IN CUBA: 1899-1970* 28 (1972) [hereinafter MESA-LAGO, *LABOR FORCE*].

87. *Id.*

88. Wachs, *supra* note 35, at 545.

89. Valdés García, *Antecedentes*, *supra* note 60, at 111.

90. Wachs, *supra* note 35, at 545.

91. LAZO, *supra* note 38, at 146.

tro press campaign had begun in the United States.<sup>92</sup> U.S. Embassy political aides and Central Intelligence Agency (CIA) advisors sided with Castro, equating Batista with evil and Castro with good.<sup>93</sup> On March 14, 1958, the United States imposed an arms embargo on Cuba. Castro announced "total war" on the Batista regime on March 17, 1958, despite having fewer than two hundred men in its command.<sup>94</sup> Although Batista reinstated constitutional guarantees on January 25, 1958, a campaign of bombing and arson led the government to again suspend these guarantees on March 12, 1958.<sup>95</sup> Similarly, general elections were postponed from June 1 to November 3, 1958, with Castro calling for the assassination of all candidates.<sup>96</sup> Under accusations of voter fraud, the government's candidate, Dr. Andrés Rivero, was declared the victor.<sup>97</sup> Diplomatically, the United States began to tell Batista to leave the country, which he did on New Year's Eve, 1958, leaving Castro the island.<sup>98</sup>

Following Batista's abdication of power, Manuel Urrutia became President of Cuba.<sup>99</sup> The first amendment to the 1940 Constitution was published on January 13, 1959.<sup>100</sup> This amendment introduced the use of constituent power by the Council of Ministers.<sup>101</sup> In effect, it gave the Council of Ministers the right to amend the Constitution in derogation of the requirements set forth in Articles 285 and 286.<sup>102</sup> Using the constituent power, the Council of Ministers, as part of that first amendment, modified Article 24.<sup>103</sup> The revised Article read as follows:

Confiscation of property is prohibited. However, confiscation is authorized in the case of property of natural persons or corporate bodies liable for offenses against the national economy or the public

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92. *Id.* at 151.

93. *Id.* at 152. Even Richard Nixon noted Castro's favorable press, acknowledging that Castro was viewed as the leader of a successful revolution against a right-wing dictator. See RICHARD NIXON, *THE MEMOIRS OF RICHARD NIXON* 201-02 (1978). Most of the U.S. Department of State's Latin American experts were ready to recognize Castro in leadership. *Id.* Nixon himself believed Castro to be "either incredibly naive about communism or under Communist discipline." *Id.*

94. LAZO, *supra* note 38, at 156-57.

95. *Id.* at 158-59.

96. *Id.* at 168.

97. *Id.* at 168-69.

98. *Id.* at 178.

99. Sanchez, *supra* note 69, at 143.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 140.



treasury committed during the tyranny which ended on December 31, 1958, as well as in the case of property of the tyrant and his collaborators. No one can be deprived of his property except by competent judicial authority and for a justified cause of public utility or social interest, and always after payment of the corresponding indemnity in cash, as fixed by a court . . . .<sup>104</sup>

## 2. *The Fundamental Law*

Later that same year, a new constitutional framework, called the Fundamental Law, came into effect, repeating provisions from the 1940 Constitution regarding property ownership.<sup>105</sup> The new Article 87, like Article 87 of the 1940 Constitution, recognized the social function of land.<sup>106</sup> This new framework was followed several months later by the first agrarian reform law.<sup>107</sup> Property immediately confiscated by the new Castro government included the following: "prop-

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104. *Id.*

105. See Navarrete Acevedo, *supra* note 59, at 84 (quoting and discussing Ley Fundamental de 1959 (G.O., Feb. 7, 1959) (Cuba) [hereinafter 1959 Fundamental Law]). One of the goals of Castro's revolution was the restoration of the 1940 Constitution, which Batista had suspended. See William R. Baerg, Comment, *Judicial Institutionalization of the Revolution: the Legal Systems of the People's Republic of China and the Republic of Cuba*, 15 LOY. L.A. INT'L & COMP. L. J. 233, 248 (1992). Instead, Castro passed the 1959 Fundamental Law. *Id.* As a result, some observers questioned whether Castro had complied with his promise. D'Zurilla, *supra* note 32, at 1239.

Some *fidelistas* (Castro supporters) contended that the 1959 Fundamental Law updated or modified the 1940 Constitution rather than replacing it. *Id.* Cuba was, at least in theory, governed by the 1940 Constitution until 1976, when the new Socialist constitution came into effect. *Id.* The *fidelistas* distinguished between Batista, whose coup they considered unconstitutional, and Castro by asserting that Batista assumed power "to loot the country" while Castro assumed power "to carry out the mandate of the people" for a revolutionary program. *Id.* at 1240.

Cuba has often been compared with Nicaragua. In Nicaragua, the main thrust of Sandinista legislation beginning in July 1979 was support for organized labor and *campesinos*, especially in the area of agrarian law and reform. The Civil Code, taken over by Latin America from the French, had been in use in Nicaragua at the time of the revolution. See MIREYA MOLINA TORRES, MARCO JURÍDICO DE LA REFORMA AGRARIA 12 (1989). Yet the Sandinistas felt that the Code was incapable of resolving the problems the new government wished to address. *Id.* In short, the Sandinista government viewed the Civil Code law as static, while decrees could be used more freely. *Id.* at 13. This approach is consistent with the revolutionary nature of the Sandinista movement.

106. See D'Zurilla, *supra* note 32, at 1223.

107. See Navarrete Acevedo, *supra* note 59, at 84. This legislation is just one example of a stream of new laws passed shortly after the 1959 Fundamental Law. In fact, the 1959 Fundamental Law itself was amended twenty-two times between January 1959 and August 1961. See Luis Salas, *The Judicial System of Postrevolutionary Cuba*, 3 NOVA L. REV. 43, 46 (1983).

erty of the tyrant,"<sup>108</sup> property of persons engaged in criminal behavior, illegal or unjust enrichments in property, property of counter-revolutionaries, and abandoned property.<sup>109</sup>

The February 7, 1959 constitutional amendments called for "all means of production" to remain in state hands.<sup>110</sup> As a result, monopolies were created, consolidating government control over banking, public utilities, and other necessary elements of production.<sup>111</sup> Provisions permitting confiscation under the Fundamental Law represented a step back from earlier requirements of compensation at fair market value.<sup>112</sup>

The first and second agrarian reform laws were of constitutional rank.<sup>113</sup> The Fundamental Law itself had constitutional rank.<sup>114</sup> That document incorporated the agrarian reform law by reference.<sup>115</sup> Consequently, these laws maintained constitutional priority until 1976, when a new constitution was enacted.<sup>116</sup>

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108. To be more precise, the 1940 Constitution was amended to allow for "confiscation in the case of property of natural persons or corporate bodies liable for offenses against the national economy or the public treasure committed during the tyranny that ended December 31, 1958, as well as in the case of the property of the tyrant and his collaborators." See Travieso-Díaz, *supra* note 24, at 230 (quoting REFORMA CONSTITUCIONAL art. 2 (G.O., Jan. 14, 1959) (Cuba) [hereinafter 1959 CONSTITUTIONAL REFORM]). This new provision was then carried over into the 1959 Fundamental Law. *Id.* at 230 (discussing the ratification and enlargement of this exception to the prohibition against confiscation in 1959 Fundamental Law).

109. Willig Presentation, *supra* note 29. Abandoned property was taken via Ley 989 (G.O., Dec. 6, 1961) (Cuba) [hereinafter Law No. 989]. See Juan C. Consuegra-Barquín, *Cuba's Residential Property Ownership Dilemma: A Human Rights Issue Under International Law*, 46 RUTGERS L. REV. 873, 903 (1994). It has been argued that Law 989 was enacted to punish those who left the country for political reasons. *Id.* If this were so, Law 989 might be subject to attack on constitutional grounds because it discriminated against a class of people due to their political beliefs. Such discrimination violates Article 33 of the 1940 Constitution and the 1959 Fundamental Law. See *id.* at 904. Similar legislation has existed in other Latin American civil code jurisdictions. See Steven E. Hendrix, *The Crisis of Land Law and Policy in Nicaragua*, 29 COMP. JURID. REV. 3, 6-7 (1992) (discussing "abandoned" property under the Civil Code and later Sandinista legislation in Nicaragua).

110. Willig Presentation, *supra* note 29.

111. *Id.*

112. Travieso-Díaz, *supra* note 24, at 233.

113. Fournier F., *supra* note 48, at 93.

114. The passing of a new constitution together with agrarian reform legislation in Cuba parallels the experience in Bolivia. See VICENTE CASANOVA, *supra* note 55, at 180 (describing the enactment of the agrarian reform law following the approval of a new constitution in Bolivia).

115. Navarrete Acevedo, *supra* note 59, at 90.

116. *Id.* While the notion of a "constitutional agrarian law" seems quite foreign for common law attorneys, there is precedent for this result in Latin American civil code countries. See, e.g., GUILLERMO FIGALLO, *TIERRA Y CONSTITUCIÓN* 7 (1990) (discussing consti-

Fidel Castro proclaimed Cuba a socialist state in 1961, but it was not until 1976 that Cuba's constitutional framework was updated.<sup>117</sup> By the time a new constitution entered into existence in 1976,<sup>118</sup> there had been a delay of seventeen years from the date of the revolution to the enactment of the first new constitution in Cuba.<sup>119</sup> In October 1974, Castro appointed a commission to prepare a Socialist constitution that would "embody the goals of his revolution."<sup>120</sup> In February 1975 the First Congress of the Cuban Communist Party approved the commission's draft by an overwhelming majority and Castro promulgated the new constitution in the beginning of the following year.<sup>121</sup>

The rehabilitation of the legal profession in Cuba began in the 1970s. During this time, Castro announced that Cuba was entering a new and "more serious, profound phase" while admitting to mistakes of earlier "revolutionary zeal" and calling for a path of greater Marxist political fidelity.<sup>122</sup> Nevertheless, problems persisted in Castro's government. During the time, Maurice Zeitlin wrote that "Cuban revolutionaries had done little to establish institutions to guarantee that competing points of view could be heard within the revolutionary Socialist consensus."<sup>123</sup> René Dumont noted the lack of confidence at the popular base, the concentration of decision-making power at the top, and Castro's reluctance to delegate.<sup>124</sup> K.S. Karol, a Polish-British journalist, asserted in 1968 that all mass organizations in Cuba had ceased to exist except on paper.<sup>125</sup> These observations prompted the Cuban leadership to reconsider its previous attitudes.<sup>126</sup>

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tutional agrarian law in Peru). In Venezuela, the agrarian reform law occupies a rank below the Constitution, but above other legislation. See ALI JOSÉ VENTURINI, *DERECHO AGRARIO VENEZOLANO* 83 (1976).

117. D'Zurilla, *supra* note 32, at 1224.

118. CONSTITUCIÓN DE 1976 (Cuba) reprinted in V CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert Blaustein & Gisbert Flanz eds., 1996) [hereinafter 1976 CONSTITUTION]; see also Fournier F., *supra* note 48, at 95-96 (providing the text of Articles 21 through 25 dealing with property).

119. Nicholas J. Gutiérrez, *The De-Constitutionalization of Property Rights: Castro's Systematic Assault on Private Ownership in Cuba* 14 (Jan. 26, 1995) (Cuba Transition Workshop: Resolution of Property Claims in Cuba's Transition, sponsored by Shaw, Pittman, Potts & Trowbridge) (unpublished manuscript on file with author) [hereinafter Cuba Transition Workshop].

120. Wachs, *supra* note 35, at 546.

121. *Id.* at 546-47.

122. Bernstein, *supra* note 2, at 197.

123. CARMELO MESA-LAGO, *CUBA IN THE 1970s: PRAGMATISM AND INSTITUTIONALIZATION* 62 (1974) [hereinafter MESA-LAGO, PRAGMATISM].

124. *Id.* at 63.

125. *Id.*

126. *Id.*

In 1970, Castro began to criticize the excessive centralization and bureaucracy of government.<sup>127</sup> An Executive Committee was established in 1972, diminishing the Prime Minister's power.<sup>128</sup> In 1973, the judicial system was reorganized.<sup>129</sup> Such reforms ushered in what was called the "new phase of the Revolution."<sup>130</sup>

In response to these changes, the rehabilitation of Cuban lawyers commenced. Castro believed more jurists<sup>131</sup> would be needed "to play a more important role with the advancing perfection of our State."<sup>132</sup> Upon adoption of the 1976 Constitution, Castro noted the Cuban Socialist state "had assumed a definitive shape, and that the provisional period of the revolutionary process had come to an end."<sup>133</sup> Consolidation in Socialist states often means an increased reliance on the principle of law.<sup>134</sup> As such, the 1976 Constitution replaced the 1959 Fundamental Law, which the first revolutionary government had drafted immediately upon assuming power.<sup>135</sup>

The relegalization of Cuba may have been the product of Cuba's increased participation in international trade that in turn gave rise to the need to institutionalize governmental functions, rather than simply relying on a "cult of personalities."<sup>136</sup> This revival of the legal profession was not so much a return to the old system, but more of an outgrowth of a more advanced stage of socialist development in Cuba.<sup>137</sup> Moreover, theorists note that the Cuban Revolution, like the Russian and Chinese Revolutions before it, outgrew its early period of revolutionary "utopianism, nihilism, sacrifice and aversion to legality" and entered the next stage of Socialist development that featured "consolidation, rationalization, material incentives and endorsement of fundamental principles of law and legality."<sup>138</sup> Similarly, the rehabilitation of the legal community in Cuba was also the result of movement from one stage of Socialist development to the next.

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127. *Id.* at 64.

128. *Id.* at 67.

129. *Id.* at 67-68.

130. *Id.* at 67.

131. During this time, the term "jurist" was used in favor of the term "lawyer" to avoid the widely-held disdain for the legal profession. Bernstein, *supra* note 2, at 197.

132. *Id.*

133. MESA-LAGO, PRAGMATISM, *supra* note 123, at 67.

134. *Id.*

135. *Id.*

136. Bernstein, *supra* note 2, at 203.

137. *Id.*

138. *Id.* at 203-04.

### 3. 1976 Constitution

The 1976 Constitution was primarily produced by a small group of government and Communist party appointees, despite strong declarations throughout the drafting process that all Cuban citizens were participating in the process.<sup>139</sup> In light of its roots, the 1976 Constitution can be seen as consistent with Cuban constitutional history from 1901 to 1976 in that the Constitution was handed down from the government and imposed on the people.<sup>140</sup>

In many respects, the 1976 Constitution is patterned on other Communist or Socialist constitutions.<sup>141</sup> However, it deviates from these constitutions in that it allows for more concentration of power in a single head of state and permits individuals to hold concurrent offices in the Council of State and the legislature.<sup>142</sup> Finally, in areas of civil, political, and cultural rights, the Cuban Constitution of 1976 remained very restrictive, bearing similarity to the 1936 Soviet Fundamental Law.<sup>143</sup> However, like most East European Socialist constitutions in effect during the period from 1960 to 1989, the Cuban Constitution departs from the Soviet Fundamental Law of 1936 by placing articles concerning the rights, duties, and guarantees of the individual early in the text, thereby giving them higher prominence.<sup>144</sup>

Because property relations pertain to the socioeconomic foundation of the state, they are treated in Chapter I of the Cuban Constitution rather than the section describing "fundamental rights" covered in Chapter VI.<sup>145</sup> Article 1 of the 1976 Constitution defined Cuba as a Socialist state of workers, peasants, and other manual and intellectual laborers.<sup>146</sup> Article 7 recognized the *Asociación Nacional de Agricultores Pequeños* (National Association of Small Producers) and other base groups.<sup>147</sup> Article 14 affirmed the social approach to Socialist

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139. Linda B. Klein, *The Socialist Constitution of Cuba*, in CUBAN COMMUNISM 506, 522 (Louis Horowitz, ed., 1987).

140. *Id.* The main exception was the 1940 Constitution, which was drafted by a wholly independent assembly of popularly elected delegates from divergent groups. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 523.

144. *Id.* at 506.

145. *Id.* at 508-09. This is the case in most Marxist-Leninist constitutions today. Klein, *supra* note 139, at 509 (noting that "in all socialist constitutions, structurally and ideologically property relations pertain to the socio-economic foundation of the state").

146. See Navarrete Acevedo, *supra* note 59, at 101 (discussing Article 1 of the 1976 Constitution).

147. See *id.* (discussing the National Association of Small Producers).

ownership of the means of production.<sup>148</sup> Article 15 defined Socialist state property, which included all land not belonging to small producers or cooperatives.<sup>149</sup> Articles 20 and 21 recognized the property rights of smallholders<sup>150</sup> to their lands, and ensured them the right to associate among themselves for agricultural production and obtaining credit and state services, and the right to sell land with prior state authorization.<sup>151</sup> Like the agrarian reform legislation, the 1976 Constitution also prohibited renting, sharecropping, mortgage credit, and

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148. Article 14 provides the following: "[T]he Republic of Cuba rules the Socialist system of economy based on the people's Socialist ownership of the means of production." 1976 CONSTITUTION art. 14 (translation by author).

149. See Navarrete Acevedo, *supra* note 59, at 102. Article 15 provides the following: [T]he socialist state property, which is the property of the entire people, becomes irreversibly established over the lands that do not belong to small farmers or to cooperatives formed by the same; over the subsoil, mines, the natural resources, and flora and fauna in the marine area over which it has jurisdiction; woods, waters, means of communication; over the sugar mills, factories, chief means of transportation; and over all those enterprises, banks, installations and properties that have been nationalized and expropriated from the imperialists, the landholders, and the bourgeoisie; as well as over the people's farms, factories, enterprises and economic, social, cultural and sports facilities built, fostered or purchased by the state in the future.

1976 CONSTITUTION art. 15 (translation by author); see also Shari-Ellen Bourque, Note, *The Illegality of the Cuban Embargo in the Current International System*, 18 B.U. INT'L L.J. 191, 204 (1995) (discussing Article 15); Sanchez, *supra* note 69, at 147. In the Soviet Constitution of 1936, even smallholdings belonged to the State. Klein, *The Socialist Constitution of Cuba*, in CUBAN COMMUNISM, *supra* note 139, at 509. The exemption in the Cuban Constitution reflects the continued existence of small farmers cultivating private property. *Id.* Nevertheless, it is apparent that the Cuban state viewed elimination of this remnant of capitalism as an immediate task in the construction of socialism. *Id.*

150. A smallholder is the owner or operator of a piece of land detached from a cottage, and cultivated to supplement his main income. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2149 (1976).

151. See Navarrete Acevedo, *supra* note 59, at 102; Fournier F., *supra* note 48, at 95. Article 20 provides the following:

- (1) The state recognizes the right of small farmers to own their lands and other means and implements of production, according to what the law stipulates.
- (2) Small farmers have the right to group themselves in the way and following the requirements prescribed by law both for the purpose of agricultural production and for obtaining state loans and services.
- (3) The establishment of agricultural cooperatives in the instances and ways prescribed by the law is authorized. Ownership of the cooperatives constitutes a form of collective ownership on the part of the peasants in those cooperatives.
- (4) The state supports the cooperative production of small farmers as well as that individual production which contributes to the growth of the national economy.
- (5) The state fosters the participation of small farmers, freely and voluntarily, in state projects and units of agricultural production.

1976 CONSTITUTION art. 20 (translation by author).

Article 21 provides the following:

other forms of implicit charges or partial transfers to individuals of the rights and actions emanating from smallholder property.<sup>152</sup>

The government also added Article 23 to the 1976 Constitution, providing the following: "The state recognizes the ownership of mixed enterprises, economic societies, and associations that are created according to law. The use, benefit, and sale of assets belonging to these entities are ruled by law and treaties as well as by their own statutes and regulations."<sup>153</sup> The government does not, however, have express constitutional power to authorize small private enterprise.<sup>154</sup>

Article 24 codifies the belief that land is only inheritable by the person who worked the land.<sup>155</sup> Finally, Article 25 of the 1976 Constitution provides for expropriation with compensation at something less than fair market value.<sup>156</sup>

(1) Small farmers have the right to sell their land with the previous authorization of the state agencies, as prescribed by law. In all cases, the state has the preferential right to purchase of the land while paying a fair price.

(2) Land leases, sharecropping, mortgages, and all other forms which entail a lien on the land or partial cession to private individuals of the rights and title to the land which is the property of the small farmers are all prohibited.

*Id.* art. 21 (translation by author).

152. See Navarrete Acevedo, *supra* note 59, at 102. To this end, Article 22 provides the following:

(1) The state guarantees the right to personal ownership of earnings and savings derived from one's own work, of the dwelling to which one has legal title and of the other possessions and objects which serve to satisfy one's material and cultural needs.

(2) Likewise, the state guarantees the right of citizens to ownership of their personal or family work tools, as long as these tools are not employed in exploiting the work of others.

1976 CONSTITUTION art. 22 (translation by author).

153. Bourque, *supra* note 149, at 205.

154. The Cuban Constitution differs in this respect from the 1936 Soviet Fundamental Law and many current socialist constitutions. Klein, *The Socialist Constitution of Cuba*, in CUBAN COMMUNISM, *supra* note 139, at 509.

155. See Navarrete Acevedo, *supra* note 59, at 102. Article 24 provides the following: The law regulates the right of citizens to inherit legal title to a place of residence and to other personal goods and chattels. The land owned by a small farmer may only be inherited by the heirs who are personally involved in its cultivation, save for the exceptions prescribed by law.

With regard to goods which are part of cooperatives, the law prescribes the conditions under which said goods may be inherited.

1976 CONSTITUTION art. 24 (translation by author).

156. Article 25 provides the following:

The expropriation of property for reasons of public benefit or social interest and with due compensation is authorized. The law establishes the method for the expropriation and the bases on which the need for and the usefulness of this action is to be determined, as well as the form of the compensation, considering the

During the 1970s and early 1980s, Castro was able to fulfill many of the guarantees contained in the 1976 charter. This was due in part to a huge annual foreign assistance package from the former Soviet Union.<sup>157</sup> However, in 1989, when the Communist bloc disintegrated and the Soviets canceled the Cuban subsidy, the government's ability to provide for the welfare of its citizens declined dramatically.<sup>158</sup> Without favorable trade agreements with Socialist nations, and with the continued trade embargo, Cuba's social and economic conditions deteriorated dramatically.<sup>159</sup> One commentator noted that "[a]lmost overnight, the island nation lost \$6 billion a year in economic aid, untold billions in military aid, and \$10 billion a year in trade."<sup>160</sup>

#### 4. *The 1992 Constitution*

By the time of the 1991 *Partido Comunista de Cuba* (Congress of the Cuban Communist Party) (PCC), the Soviet Union itself was in the process of disintegrating.<sup>161</sup> With the demise of Lenin's revolution, there was no longer any hope that Communist forces could wage a successful revolt against capitalism.<sup>162</sup> In Cuba itself, the PCC was faced with a failing economy with "irreversible difficulties" and "a society slipping further and further away from any possibility of economic prosperity."<sup>163</sup> Several political scandals led to purges of high government officials, and a "cleansing" of party organs.<sup>164</sup> Leadership also began to remove reformers from the party, including members of the Central Committee itself.<sup>165</sup> As food became less plentiful, demands for private farms increased in force.<sup>166</sup>

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interests and economic and social needs of the person whose property has been expropriated.

1976 CONSTITUTION art. 25 (translation by author); see also Travieso-Díaz, *supra* note 24, at 233 (citing Article 25 of the 1976 Constitution).

157. Wachs, *supra* note 35, at 547-48.

158. *Id.*

159. *Id.*

160. William Deibler, *Helpless in Havana*, PITTSBURGH POST-GAZETTE, Mar. 6, 1994, at D4.

161. Juan M. del Aguila, *The Party, the Fourth Congress, and the Process of Counter-reform*, in CUBA AT A CROSSROADS: POLITICS AND ECONOMICS AFTER THE FOURTH PARTY CONGRESS 19, 20 (Jorge F. Perez-Lopez ed., 1994).

162. *Id.*

163. *Id.*

164. *Id.* at 20-21.

165. *Id.* at 21.

166. ANDREAS OPPENHEIMER, *CASTRO'S FINAL HOUR: THE SECRET STORY BEHIND THE COMING DOWNFALL OF COMMUNIST CUBA* 302 (1992).



In this context, the Fourth Party Congress sought to renew the party. However, no dramatic changes along the lines of a "Cuban-style perestroika" occurred; the Fourth Party Congress simply restated its commitment to a single party.<sup>167</sup> In short, the masses could expect no fundamental economic or political reforms: capitalism would not return.<sup>168</sup> The top political leadership in the PCC controlled the preparations for the October 1991 Congress, preserving the unity and harmony of the party and meeting the demands of political leaders.<sup>169</sup> Fidel Castro proclaimed, "[T]here will not be a market economy, by whatever name; it has nothing to do with socialism. Our economy will be programmed and planned."<sup>170</sup> Subsequently, in 1992, a new Constitution was promulgated.<sup>171</sup>

The 1992 Constitution scales back on the scope of State ownership.<sup>172</sup> The new Constitution applies to only the "fundamental" means of production rather than all means of production, allowing for some private divestiture of state-owned assets.<sup>173</sup> In all other respects, however, the new constitution mirrors its predecessors. Articles 20, 21, and 22 of the 1976 Constitution correspond to Articles 19, 20, and 21 of the 1992 document.<sup>174</sup> Article 19 prohibits rental, sharecropping, mortgages or any other lien on agricultural property, and commits the state to support small farmers and private farming.<sup>175</sup> Article 20 pledges the state's support of agricultural cooperatives,<sup>176</sup> and Article 21 private personal property.<sup>177</sup> Other provisions protect mixed enterprise property<sup>178</sup> and provide for expropriation with compensa-

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167. del Aguila, *supra* note 161, at 24-25.

168. *Id.* at 25.

169. *Id.* at 26.

170. *Id.* at 29.

171. 1992 CONSTITUTION. The constitutional changes were approved by the National Assembly as a result of recommendations made at the Fourth Party Congress in October 1991. *See generally* del Aguila, *supra* note 161, at 24-39. Major changes brought about in the new constitution included allowing private investment in certain state companies and permitting foreign ownership of property in joint venture enterprises. *See* Cameron, *supra* note 14, at 482.

172. Article 14 of the 1992 Constitution provides the following: "En la República de Cuba rige el sistema de economía basado en la propiedad Socialista de todo el pueblo sobre los medios fundamentales de producción y en la supresión de la explotación del hombre por el hombre . . ." 1992 CONSTITUTION art. 14.

173. *Id.* *See also* Willig Presentation, *supra* note 29.

174. Travieso-Díaz, *supra* note 24, at 229.

175. 1992 CONSTITUTION art. 19.

176. *Id.* art. 20.

177. *Id.* art. 21.

178. *Id.* art. 23.

tion.<sup>179</sup> Finally, the 1992 Constitution maintains the importance of the social function of land by asserting that land should belong to the person who works it.<sup>180</sup>

### 5. Summary

In summary, Cuba's several constitutions have preserved strong individual rights in property, beginning with the 1901 Constitution and carried through into the 1992 Constitution. The social function of land was acknowledged and incorporated into the 1940 Constitution. Civil Code legislation clearly expressed the need for compensation for public expropriation. In keeping with the spirit of this social function, Cuban law had evolved to a stage where all means of production were under state control, as presented in the 1976 Constitution. By 1992, however, there had been some retreat from this position, illustrated by changes in the new Constitution requiring only the fundamental means of production to rest in state hands.

## B. The Agrarian Reform and Rural Land Ownership

### 1. Context for Reform: Prerevolutionary Agriculture

Land tenure was cited as a constraint to development in the 1950s by proponents of agrarian reform.<sup>181</sup> Cuban peasants were well or-

179. *Id.* art. 25. Furthermore, Article 60 of the 1992 Constitution permits confiscation of property. *Id.* art. 60.

180. *Id.* art. 24.

181. VICENTE CASANOVA, *supra* note 55, at 173-74; Valdés García, *Antecedentes, supra* note 60, at 173-74. As illustrated by the chart below, over half of the land in Cuba was held by landowners holding over 100 hectares of land and 20% of land area was held by very large estates in holdings over 5000 hectares in size. This backdrop provided a basis for reform efforts in the land tenure system.

DISTRIBUTION OF LAND IN CUBA: 1946				
Range (in hectares)	Number of Units	Percent of total units	Hectares	Percent of land area
Less than 0.4	1148	0.7	280	0.0
0.4 to 0.5	1877	1.2	1399	0.0
1.0 to 4.9	29,170	18.2	84,354	0.9
5.0 to 9.9	30,305	18.9	210,706	2.3
10.0 to 24.9	48,778	30.5	725,071	8.0
25.0 to 49.9	23,901	14.9	789,715	8.7
50.0 to 74.9	8157	5.1	488,648	5.4
75.0 to 99.9	3853	2.4	329,681	3.6
100.0 to 499.9	10,433	6.5	2,193,600	24.2
500.0 to 999.9	1442	0.9	992,531	10.9
1000.0 to 4999.9	780	0.5	1,443,500	15.9
More than 5000.0	114	0.1	1,817,692	20.0

ganized to oppose the government and demand expropriation.<sup>182</sup> In addition, demands for expropriation also came from the middle class who felt excluded from economic participation due to massive foreign ownership.<sup>183</sup> For these individuals, upward mobility meant only government service, because private industry was in the hands of foreigners who also occupied most of the best jobs.<sup>184</sup> Perceived to be chronically high, unemployment was a serious problem of the pre-revolutionary economic system.<sup>185</sup> These factors contributed to the change in government and the demand for agrarian reform.<sup>186</sup>

Nevertheless, prior to the Castro revolution, Cuba's economic picture was not as exaggerated as in other countries in Latin America. In terms of land distribution, Cuba was typical of other Latin Ameri-

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Memoria del Censo Agrícola Nacional 1946 [National Agricultural Census Survey 1946] 84 (1951) (on file with the Land Tenure Center Library, University of Wisconsin).

182. Their high degree of organization is demonstrated, for example, in the creation in 1958 of the Agriculture Bureau (*Buro Agrario*) dedicated to the study of the agricultural problems of the peasantry, along with the Eastern Peasant Federation (*Federación Campesina de Oriente*) and the Regional Peasant Committee (*Comité Regional Campesino*). See Navarrete Acevedo, *supra* note 59, at 79-80.

183. See VALDÉS GARCÍA, *SOCIALIZACIÓN* *supra* note 60, at 4; see also Nelson R. Amaro, *Mass and Class in the Origins of the Cuban Revolution*, in CUBAN COMMUNISM, *supra* note 139, at 23. In the first months following the revolution, 90% of the population supported the new government. *Id.* at 25. In 1962, support for the new government remained high. *Id.* at 16. In one survey, 80% of Afro-Cubans and 67% of whites favored the revolution. *Id.* at 16 (discussing Maurice Zeitlin's 1962 study entitled *Economic Insecurity and the Political Attitudes of Cuban Workers*). Support for the revolution was strongest among blacks who had worked nine months or less before the revolution. *Id.* (citing the figure as 91%).

184. See Fournier F., *supra* note 48, at 77.

185. See Brian H. Pollitt & G.B. Hagelberg, *The Cuban Sugar Economy in the Soviet Era and After*, CENTER FOR DEVELOPMENT STUDIES OCCASIONAL PAPER NO. 11 (June 1995) (on file with the Land Tenure Center Library, University of Wisconsin).

186. See *id.* (discussing the unpleasant conditions for peasants that prompted the infant guerilla government to pass a law stating that the land should be assigned to those who work it).

can countries.<sup>187</sup> Cuba was near the top of many countries in terms of

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INEQUALITY IN THE DISTRIBUTION OF LAND IN VARIOUS COUNTRIES			
Country	Year	Gini Coefficient	Data Source
VERY HIGH INEQUALITY (Gini above 75)			
Uruguay	1967	93.95	Jarvis at 16.
Uruguay	1980	84	<i>Id.</i>
Guatemala*	1950	97.64	<i>Id.</i> at 9.
Paraguay*	1956	95.60	<i>Id.</i> at 14.
Paraguay	1981	94	Thiesenhusen at 9.
Colombia*	1960	94.4	Jarvis at 5.
Chile*	1964	91.67	<i>Id.</i> at 4.
Ecuador	1954	88.46	<i>Id.</i> at 7.
Nicaragua	1967	86.15	<i>Id.</i> at 17.
Brazil*	1965	83.50	Jarvis at 3.
Brazil	1980	86	Thiesenhusen at 9.
Panama	1981	84	<i>Id.</i>
Saudi Arabia	1983	83	Thiesenhusen at 9.
Cuba	1946	80.61	Census
Kenya	1981	77	Thiesenhusen at 9
HIGH INEQUALITY (51 to 75)			
Colombia	1984	70	<i>Id.</i>
Dominican Republic	1981	70	<i>Id.</i>
Ecuador	1987	69	<i>Id.</i>
Grenada	1981	69	<i>Id.</i>
Costa Rica	1960	66.39	Jarvis at 6
Chile	1987	64	Thiesenhusen at 9.
Honduras	1981	64	<i>Id.</i>
Yemen	1982	64	<i>Id.</i>
Sri Lanka	1982	62	<i>Id.</i>
Peru	1984	61	<i>Id.</i>
Nepal	1982	60	<i>Id.</i>
Uganda	1984	59	<i>Id.</i>
Turkey	1980	58	<i>Id.</i>
Jordan	1983	57	<i>Id.</i>
Pakistan	1980	54	<i>Id.</i>
Panama	1960	53.66	Jarvis at 13.
Philippines	1981	53	Thiesenhusen at 9.
MEDIUM INEQUALITY (40 to 50)			
Bahrain	1980	50	<i>Id.</i>
Bangladesh	1980	50	<i>Id.</i>
Morocco	1982	47	<i>Id.</i>
Togo	1983	45	<i>Id.</i>
Ghana	1984	44	<i>Id.</i>
LOW INEQUALITY (below 40)			
Malawi	1981	36	<i>Id.</i>
Mauritania	1981	36	<i>Id.</i>
Egypt	1984	35	<i>Id.</i>
Niger	1981	32	<i>Id.</i>
Korea, Republic of	1980	30	<i>Id.</i>

socioeconomic indicators, with a large middle class and very progressive social legislation for workers and unions.<sup>188</sup> At the same time, "Cuban labor laws, rigidly enforced, were more advanced in almost every respect [in comparison to] those in the United States."<sup>189</sup> Agricultural workers were also well paid.<sup>190</sup> According to the International Labor Organization, the average wage in 1958 was \$3 per eight hour day.<sup>191</sup> When adjusted for purchasing power, this compares favorably with Belgium (\$2.70), Denmark (\$2.86), France (\$2.73), West Germany (\$2.73), and the United States (\$4.06).<sup>192</sup> These same statistics disclosed that Cuban workers received 66.6% of the gross national income compared with 57.2% for Argentina, 47.9% for Brazil, and 70.1% for the United States.<sup>193</sup>

With the possible exception of Venezuela, Cuba had attained the highest standard of living of any semi-tropical or tropical country in the world by the mid 1950s.<sup>194</sup> By 1956, the U.S. Department of Commerce concluded that the Cuban national income had reached levels that gave the Cuban people one of the highest standards of living in Latin America.<sup>195</sup> A 1951 World Bank report noted that the standard of living for farmers, agricultural laborers, industrial workers, storekeepers, and others were all higher than the standard for corresponding groups in other tropical countries and in nearly all other Latin American countries.<sup>196</sup> Although the report did not say there was no dire poverty in Cuba, it did assert that in comparative terms Cubans were better off than their counterparts abroad.<sup>197</sup>

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Countries marked with an asterisk indicate reduced reliability of calculation due to the data sets. Gini coefficient is defined as a measure of inequality in distribution. It ranges from zero to one: the closer the value to 1, the greater the inequality. Gini coefficients calculated by Marco Castillo, Research Assistant, Land Tenure Center, University of Wisconsin (1995). WILLIAM C. THIESENHUSEN, *BROKEN PROMISES: AGRARIAN REFORM AND THE LATIN AMERICAN CAMPESINO* 9 (1995). Data from Kenna Jarvis, *Country by Country Land Distribution Percentages in Latin America* (1971) (on file with the Land Tenure Center Library, University of Wisconsin). National Agricultural Census Survey 1946, *supra* note 181, at 84.

188. Thompson, *supra* note 3, at 36.

189. LAZO, *supra* note 38, at 97.

190. *Id.*

191. *Id.* at 97-98.

192. *Id.* at 98.

193. *Id.*

194. *Id.* at 96.

195. *Id.* (citing U.S. DEP'T OF COMMERCE, *INVESTMENT IN CUBA* 184 (1956)).

196. *Id.* at 96-97 (discussing the Economic and Technical Mission of the International Bank for Reconstruction and Development's 1951 Report on Cuba).

197. *Id.* at 97.

In the areas of education and literacy, Cuba was also near the top in Latin America.<sup>198</sup> Cuba was first in the region in terms of the percent of national income spent on education.<sup>199</sup> It was less expensive to obtain a college education in Cuba than in the United States.<sup>200</sup> Similarly, compared with the United States, Cuba had twice as many physicians and surgeons—and twice as many teachers—in relation to its population.<sup>201</sup> Its infant and adult mortality rates were lower than the United States.<sup>202</sup> Food was abundant and the island was nearly disease-free.<sup>203</sup> No nation except the United States had as many television sets per capita as Cuba.<sup>204</sup>

The positive condition of the Cuban economy relative to other countries in the region was not well understood. Pre-Castro Cuba is often depicted as a country in which a wealthy few exploited illiterate and poverty-stricken masses and where large farms were becoming larger, with the small farmers getting pushed out of the market, a view underscored by Columbia University Professor C. Wright Mills.<sup>205</sup> Eleanor Roosevelt asserted that “perhaps a Socialist government would be the best solution [for Cuba].”<sup>206</sup> President John F. Kennedy remarked:

I think that there is not a country in the world, including all the regions of Africa and including any country under colonial domination, where the economic colonization, the humiliation, the exploitation have been worse than those which ravaged Cuba, the result, in part, of the policy of my country, during the regime of Batista. I think that we spawned, constructed, entirely fabricated without knowing it, the Castro movement. I think that the accumulation of such errors has endangered all of Latin America . . . I will tell you something else: In a certain sense, it is as though Batista were the incarnation of some of the sins committed by the United States. Now, we must pay for those sins . . .<sup>207</sup>

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198. *Id.* at 106.

199. *Id.*

200. *Id.*

201. *Id.* at 107.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 96 (discussing comments made by Professor Mills after a 1959-1960 visit to Cuba).

206. *Id.*

207. *Id.* at 94 (quoting President Kennedy's remarks published in the *New York Times*, Dec. 11, 1963).

Despite Kennedy's remark, the United States had supported Cuba for years by purchasing sugar at considerably above world market prices.<sup>208</sup> In 1958, only about five percent of invested capital in Cuba was from the United States.<sup>209</sup> During the 1950s, there was a marked trend in Cuba away from American ownership in favor of national ownership of sugar mills.<sup>210</sup> In 1958, Cuban-owned mills accounted for sixty-two percent of the total sugar production, while in 1939 the figure was only twenty-two percent.<sup>211</sup> Despite this fact, U.S. private capital and technology served as the "principal contributing factor in making Cuba the most industrialized country in Latin America in ratio to population, and in raising its living standards to one of the highest."<sup>212</sup> In this context, it appears Kennedy and others were mistaken about the economic state of affairs in Cuba, perhaps reflecting the success of Castro's propaganda campaign.<sup>213</sup>

Nevertheless, before the 1959 agrarian reform, Cuban agriculture did suffer from wealth concentrations.<sup>214</sup> During the period between 1940 and 1959, Cuba tripled its national income.<sup>215</sup> Tourism was becoming an increasingly important source of income for the island.<sup>216</sup> Yet a 1951 World Bank report indicated that reform of the agriculture sector was urgent: if measures to reform the sector were not implemented, the chances for an institutional takeover provoked by the right or left would increase.<sup>217</sup> Owners of 46% of the land comprised 1.5% of the general population, while 70% of farms occupied less than

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208. *Id.* at 108.

209. *Id.* at 98.

210. *Id.* at 99.

211. *Id.*

212. *Id.* at 108.

213. *Id.* at 96, 116, 151-53.

214. Fournier F., *supra* note 48, at 77. In summary:

Tomas Estrada Palma was elected the first Cuban president [but was replaced by the Liberal president Jose Miguel Gomez in 1909]. The Gomez presidency established a pattern of graft, corruption, and social injustice toward Afro-Cubans that succeeding presidents and dictators followed. Cuba continued to attract American investment, and this investment combined with the growing sugar industry, tourism, and gambling, caused the economy to prosper. [This prosperity benefited only a few Cubans, primarily politicians and their relatives]. In 1958, following a prolonged period of exile and guerrilla warfare against the Cuban government . . . Fidel Castro [supplanted] the longtime dictator Fulgencio Batista.

3 NEW ENCYCLOPEDIA BRITANNICA 772, 773 (Philip W. Goetz ed., 15th ed. 1988).

215. Amaro, *supra* note 183, at 20.

216. *Id.*

217. MESA-LAGO, LABOR FORCE, *supra* note 86, at 32.

12% of the island.<sup>218</sup> Sharecropping, tenant farming, and illicit farming by squatters were common, leading to complaints about social justice and questions about efficiency in production.<sup>219</sup> A 1957 survey by the Catholic University Association found that the peasant class expected its economic problems to be resolved politically, equating the ultimate economic power with the highest political authority.<sup>220</sup> Peasants began to question the nation's legal order, because the legal structures they identified with political power supported the elite groups.<sup>221</sup>

The new Organic Law echoed the Constitution of 1940 in prohibiting large landholdings. Both permitted subsequent legislation to abolish them.<sup>222</sup> In this context, the agrarian reform sought to approximate the technical advantages of large-scale production through cooperatives, while taking advantage of the intensive cultivation practices found on smaller farms.<sup>223</sup>

Studies carried out by the United Nations noted the extremes in property distribution and the plight of the poor.<sup>224</sup> The United Nations report looked to diversify agricultural production and promote productivity, especially for export crops.<sup>225</sup> Further, the study looked for increased standards of living for Cuban nationals.<sup>226</sup> The review singled out resource concentration as the major impediment and

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218. Ley de Reforma Agraria, whereas cls. 7, 8 (G.O. Edición Extraordinaria especial, June 3, 1959) (Cuba) [hereinafter Agrarian Reform Law]; see also Amaro, *supra* note 183, at 13 (noting that before the Castro revolution of 1959, Cuba marked with a general malaise of class disequilibrium).

LAND DISTRIBUTION AT THE TIME OF THE FIRST AGRARIAN REFORM LAW (1959)				
Farm Size	Property Owners	Percentage of Property Owners	Area (Caballerías)	Percentage of Total Area
Up to 5 <i>Caballerías</i>	20,229	66.2	46,842	7.4
From 5 to 30 <i>Caballerías</i>	7485	24.4	122,314	19.2
More than 30 <i>Caballerías</i>	2873	9.4	465,994	73.4
Totals	30,587	100	635,150	100

Navarrete Acevedo, *supra* note 59, at 85 (sworn declarations of property owners). 1 *caballería* = 13.4 hectares = 33 acres.

219. Agrarian Reform Law whereas cl. 5.

220. Amaro, *supra* note 183, at 16.

221. *Id.*

222. Agrarian Reform Law whereas cl. 5.

223. *Id.* whereas cl. 13.

224. See VICENTE CASANOVA, *supra* note 55, at 173-74.

225. *Id.*

226. *Id.*



called for land reform.<sup>227</sup> It should be noted that poverty was an increasing problem by the time of the Revolution; unemployment and underemployment had increased throughout the 1940s and 1950s, reaching a combined total of thirty percent of the labor force by 1956-57.<sup>228</sup>

The Batista government recognized that tenant smallholders and holders of precarious title had been excluded from participation in the benefits of the established rural economy and promulgated Decree Law No. 247 to protect their interests.<sup>229</sup> In 1952, the Cuban government launched a new program to force landowners to allow current occupants to rent the land.<sup>230</sup> This new legislation was passed in the belief that land access and security for smallholders would stimulate and promote production.<sup>231</sup> At that time, it was recognized that "private property [was] subject to restrictions dictated by considerations of national necessity."<sup>232</sup> The authors of the law understood that the existing legislation

had not been adequate to prevent the eviction of the peasants and their families from the lands cultivated by them, so that a state of unrest in public opinion and disturbances of public order [had] occurred in the areas of conflict, to the detriment of agricultural production and national supplies, so that the usefulness of the estates concerned [had] been impaired, and the inalienable right to work and to a decent subsistence, vouch-safed to citizens under the Basic Law, [had] been prejudiced.<sup>233</sup>

Rental of these private properties was stipulated by law to be at a rate of not more than five percent of its sale value, as recorded by the Government.<sup>234</sup> Thus, restrictions on the use of private property began before the Castro government's coming to power.<sup>235</sup> Further, as

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227. *Id.*; see also Fournier F., *supra* note 48, at 77-78 (discussing reform proposals after the promulgation of Law No. 3).

228. MESA-LAGO, LABOR FORCE, *supra* note 86, at 28.

229. See Decreto Ley No. 247 whereas cl. 2 (G.O. No. 171, July 23, 1952) (Cuba), *translated in* Food and Agriculture Organization of the United Nations (on file with the Land Tenure Center Library, University of Wisconsin) [hereinafter Decree Law No. 247].

230. See *id.* The compulsory nature of this rental obligation is found in Article 6. *Id.*

231. *Id.* whereas cl. 2.

232. *Id.* whereas cl. 3.

233. *Id.* whereas cl. 4.

234. *Id.* art. 3.

235. Decree Law No. 247 and its restrictions were promulgated in 1952, while the Revolution did not occur until 1959. Decree Law No. 247.

subleasing was also prohibited, restrictions on the ownership rights of beneficiaries also predated the 1959 revolution.<sup>236</sup>

Although many Latin American governments maintained similar restrictions on land, revolutions did not occur in these countries. In contrast, the Batista government's failure to extend land reform likely led to its overthrow. Subsequent agrarian reform legislation should be properly understood as an extension of earlier policy, rather than a revolutionary reversal of law. From a 1990s perspective, Batista deserves some credit for his consideration of the poor. On the other hand, critics of Castro cannot hearken back to a golden age of property rights prior to Castro when property rights were absolute.

## 2. The 1959 Agrarian Reform Law

### a. Farm Sizes and Expropriation

By May 1961 more than forty percent of land that had been in private hands was expropriated, representing some four million hectares of land.<sup>237</sup> Unlike the Mexican agrarian reform, which allowed owners to retain the best land, the Cuban nationalization included land in the most fertile areas.<sup>238</sup>

Large farms were prohibited under the reform law.<sup>239</sup> In general, each person, either natural or juridical, was limited to thirty *caballerías* of land.<sup>240</sup> Any excess could be expropriated for distribution to landless peasants.<sup>241</sup> Exceptions to this rule were introduced for the

236. *Id.* art. 15.

237. RENÉ DUMONT, CUBA: SOCIALISM AND DEVELOPMENT 60 (1970).

238. *Id.*

239. Agrarian Reform Law art. 1. See also CHIUMINATTO C., *supra* note 53, at 39.

240. Agrarian Reform Law art. 1. Limitations on land size are typical in Latin American agrarian reform legislation. See, e.g., 1992 CONSTITUCIÓN tit. 1, art. 1, § 27 (XV) (Mex.).

241. Agrarian Reform Law art. 1. The law affected certain areas of land, as described below:

LANDS AFFECTED FOR REDISTRIBUTION	
Specific Article from the Agrarian Reform Law of 1959	Properties Affected
Article 1	Land above the maximum limit of 30 <i>Caballerías</i> for any natural or legal person.
Articles 3 and 4	State, Province, or Municipal land, except those dedicated for forest reserves, social goals or, public or service establishments.
Article 11	Property less than 30 <i>Caballerías</i> if it was subject to rental agreements, sharecropping or squatting.
Article 13	Sugar cane properties belonging to foreign interests or belonging to persons owning processing plants.
Transitory provisions	Property uncultivated within 2 years of the new legislation.

following: (a) high yield sugar cane plantations,<sup>242</sup> (b) cattle production meeting minimum standards set by the Agrarian Reform Institute,<sup>243</sup> (c) high yield rice plantations,<sup>244</sup> and (d) produce or stock that required land areas larger than thirty *caballerías* for efficient production from a technical and economic vantage.<sup>245</sup> The law specified an absolute size limit of one hundred *caballerías* for properties falling into the first three of these exceptions.<sup>246</sup> Any excess beyond one hundred *caballerías* could be expropriated.<sup>247</sup> As for the fourth exception, the National Agrarian Reform Institute (INRA) was empowered to monitor the farm to insure production was maintained.<sup>248</sup> Other land was exempt entirely: cooperative land, land owned by states, provinces or municipalities, national forest reserves, and rural community land for social welfare, education, health or other similar purposes.<sup>249</sup>

Sharecropping and land rental were expressly forbidden.<sup>250</sup> Farms of thirty *caballerías* or less and with no leases, subleases, sharecropping, or squatting were not in danger of expropriation.<sup>251</sup> On farms of thirty *caballerías* or less, expropriation remained a threat if the land was leased, subleased or sharecropped, or occupied by squatters.<sup>252</sup>

Expropriation of excess land was priority ranked.<sup>253</sup> First, expropriation began only on state lands and private lands where farmers were working the land with leases, subleases, sharecropping or squat-

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RAFAEL MENJIVAR, *REFORMA AGRARIA: GUATEMALA, BOLIVIA, CUBA* 390-91 (1969).

242. Agrarian Reform Law art. 2(a) (defining high yield sugar cane as "not less than 50% more than the average natural production" based on the last harvest's figures).

243. *Id.* art. 2(b).

244. *Id.* art. 2(c) (defining high yield rice plantations as those on which production was "no less than 50% more than the average natural production" based on the last harvest's figures).

245. *Id.*

246. *Id.* art. 2, para. 2.

247. *Id.*

248. *Id.* art. 3, para. 4.

249. *Id.* art. 4.

250. *Id.* art. 11.

251. *Id.* art. 6. There is evidence that, in practice, all property over five *caballerías* was expropriated. John P. Rathbone, *Private Property Rights in Cuba (1992): Farmland*, LA SOCIEDAD ECONÓMICA DE AMIGOS DEL PAÍS BULLETIN (La Sociedad Economica, London, England), Apr. 8, 1992, at 2 [hereinafter Rathbone, *Farmland*].

252. Agrarian Reform Law art. 6. *See also* Resolución No. 283/86 whereas cl. 1 (G.O., July 31, 1986) (Cuba) [Resolution No. 283/86] (citing 1992 CONSTITUTION art. 14).

253. *Id.* art 5.

ting.<sup>254</sup> Once this source of land was exhausted, then expropriation could proceed to farm areas exceeding the maximum size limits.<sup>255</sup> The law also provided that, when in doubt, the law should be construed in favor of the person working the land.<sup>256</sup>

Under the second Agrarian Reform Law, agricultural properties larger than five *caballerías* were subject to expropriation.<sup>257</sup> Special rules were set up to allow for the voluntary sale of property to the state, for persons preferring a process other than forced expropriation.<sup>258</sup> Similarly, special rules allowed for indemnification of smallholders of five *caballerías* or less who were affected by the agrarian reform law and who relied on rental income from that plot as their only means of income.<sup>259</sup> In cases of forced expropriation, INRA was charged with carrying out the appropriate procedures until a land court could be organized.<sup>260</sup>

Other takings of land came from nationalization. In February 1960, Cuba entered into a trade agreement with the Soviet Union allowing Cuba to receive Soviet crude oil.<sup>261</sup> At that time, the Cuban government owed the American refineries about \$60 million.<sup>262</sup> Ernesto "Che" Guevarra, then President of the National Bank, notified

SOURCES OF LAND EXPROPRIATED FOR THE AGRARIAN REFORM (1959-1961)			
Legal Instrument	<i>Caballerías</i>	Hectares	Percent
Agrarian reform law	89,358	1,199,184	27.0
<i>Ley de Recuperación de Bienes Malversados</i>	12,162	163,214	3.7
Donations to INRA	24,038	322,590	7.3
Voluntary sales	43,350	581,757	13.1
Nationalization Law 851	94,008	1,261,587	28.4
Nationalization Law 890	67,850	910,547	20.5
Modifications to art. 24, Ley Fundamental	N.A.	N.A.	N.A.
TOTALS:	330,766	4,438,879	100

MENJIVAR, *supra* note 241, at 405-06. Modifications to Article 24 were made in December 1959 to permit the confiscation of property of Cubans who had participated in the Bay of Pigs invasion. 1959 Fundamental Law.

254. Agrarian Reform Law art. 5(a).

255. *Id.* art. 5.

256. *Id.* art. 64.

257. MENJIVAR, *supra* note 241, at 409.

258. See Navarrete Acevedo, *supra* note 59, at 99 (citing Resolución No. 178 (Nov. 30, 1967) [hereinafter Resolución No. 178]).

259. *Id.* at 100 (citing Resolución No. 266 (Aug. 29, 1961) (Cuba) as modified by Resolución No. 178 (Nov. 30, 1967) (Cuba) [hereinafter Resolución 178]).

260. *Id.* at 101 (citing Ley No. 588 (Oct. 1959) (Cuba) [hereinafter Law No. 588]).

261. LAZO, *supra* note 38, at 226.

262. *Id.*

the refineries that they would have to process the Soviet crude oil.<sup>263</sup> When they refused, the Cuban government not only canceled the prior \$60 million debt, but also seized their facilities, valued at the time at about \$140 million.<sup>264</sup>

In July 1960 Nationalization Law Number 851 was passed in response to the sugar quota cancellation by the U.S. State Department.<sup>265</sup> Compensation was paid in bonds to be backed, ironically, by proceeds from future sugar purchases from the United States.<sup>266</sup> Presumably, this amount would be zero.<sup>267</sup> The United States classified this nationalization as a confiscatory action.<sup>268</sup> In fact, Castro had expected the cancellation of the sugar quota for some time, and "Che" Guevarra had urged the United States to make the move "the sooner the better."<sup>269</sup> Nationalization Law No. 890 affected any lands belonging to foreigners or Cuban citizens not previously affected, particularly sugar cane engineers, the majority of whom were U.S. citizens.<sup>270</sup>

The *Ley de Recuperación de Bienes Malversados* (Law to Recover Usurped Properties) provided for confiscation of properties of national patrimony that the new government thought had been usurped by functionaries of the outgoing Batista government.<sup>271</sup> From 1952 to 1959, Batista and many of his officials had become wealthy, and the new law was directed at recovery of those assets.<sup>272</sup> For these properties, there was no compensation or indemnification. As a result of this law, about \$200 million worth of property was confiscated from Batista government officials and their alleged support-

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263. *Id.*

264. *Id.*

265. See MENJIVAR, *supra* note 241, at 404 (discussing Ley de Nacionalización 851 of July 1960).

266. See George R. Harper, *Cuban and Peruvian Agrarian Reforms: At the Crossroads*, 24 U. MIAMI L. REV. 763, 764 (1970).

267. *Id.* at 765.

268. *Id.*

269. LAZO, *supra* note 38, at 228.

270. Harper, *supra* note 266, at 765.

271. Consuegra-Barquín, *supra* note 109, at 900. See also Resolución No. 776 (Oct. 7, 1960) (G.O., Oct. 14, 1960) (Cuba) (citing Ley No. 879 (Sept. 24, 1960) (G.O., Sept. 28, 1960) (Cuba)); MENJIVAR, *supra* note 241, at 403 (citing Ley de Recuperación de Bienes Malversados (Nov. 13, 1959) (Cuba) [hereinafter Law of the Recovery of Misappropriated Goods]).

272. Consuegra-Barquín, *supra* note 109, at 900.

ers.<sup>273</sup> This amount corresponded to about four percent of lands nationalized.<sup>274</sup>

*b. Rules for Expropriation of Sugar Plantations*

Legislation required that sugar plantation ownership be recorded within a year of the 1959 law.<sup>275</sup> However, all stockholders had to be Cuban citizens.<sup>276</sup> Further, shareholders could not be owners, stockholders, or officers in any company engaged in sugar manufacturing.<sup>277</sup> Presumably, this restraint was to avoid conflicts of interest or transfer pricing, defined as the ability to avoid taxes by over-invoicing intercompany accounts carried out by a foreign parent company of a domestic subsidiary.<sup>278</sup> Companies not in compliance could be subjected to expropriation of their land.<sup>279</sup> Stockholders who did not meet the new requirements were given a year to sell their interests on terms approved by INRA.<sup>280</sup> More broadly, no unregistered corporation of any sort could hold agricultural land.<sup>281</sup> Already registered companies could, of course, own land, subject to the size limits.<sup>282</sup> To prevent companies from moving land around to avoid the risk of expropriation, transfer of company-held agricultural property to another company was forbidden.<sup>283</sup>

*c. Citizen Ownership Requirements*

Agrarian legislation provided that only Cuban citizens and companies formed by Cubans could acquire rural property from 1959 onward, unless exempted by INRA, which could permit foreign corporate ownership.<sup>284</sup> Similarly, non-Cuban citizens could not acquire rural property through inheritance; such land was subject to gov-

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273. See Travieso-Díaz, *supra* note 24, at 234 (1995) (citing MICHAEL W. GORDON, *THE CUBAN NATIONALIZATIONS: THE DEMISE OF FOREIGN PRIVATE PROPERTY* 73 (1976)).

274. DUMONT, *supra* note 237, at 60.

275. Agrarian Reform Law art. 12.

276. *Id.* art. 12(b).

277. *Id.* art. 12(c).

278. For a discussion of transfer pricing abuses, especially among international corporations in Latin America, see Steven E. Hendrix, *A Review of Argentine and Ecuadorian Tax Law Regarding Transfer Pricing and Recommendations for Improving Ecuador's Approach*, 20 U. MIAMI INTER-AM. L. REV. 283, 284-90 (1989).

279. Agrarian Reform Law art. 12.

280. *Id.* art. 13.

281. *Id.* art. 14.

282. *Id.*

283. *Id.*

284. *Id.* art. 15. The present Mexican constitution is quite similar in text, providing the following:

ernment expropriation.<sup>285</sup> A special resolution exempted foreigners from the Article 15 prohibitions of agricultural land ownership where the foreign farmer occupied land equal to or less than the minimum.<sup>286</sup>

*d. Redistribution of Land and Indemnification of Owners*

Immediately after Castro's rise to power, Ernesto "Che" Guevarra, an early revolutionary leader, claimed that "[i]f Agrarian Reform were to have to pay indemnities to owners, it would take effort slowly and at great cost . . . peasants must engage in collective action and democratically *demand* that this principle be waived."<sup>287</sup> In 1960, Major Luís Borgés asserted that all he needed to do to expropriate land was to "sign a little paper."<sup>288</sup> Expropriations were carried out with no preconceived plan, and no one spoke of even the smallest indemnity.<sup>289</sup> By the end of 1960, the Castro government had taken more than \$25 billion of privately owned Cuban property and almost \$1 billion of property owned by U.S. citizens.<sup>290</sup>

According to agrarian reform legislation, the vital minimum of fertile, nonirrigated, rural land for a five person family was defined as two *caballerías*.<sup>291</sup> State lands, and any private lands qualifying for expropriation, were to be granted in full to cooperatives or distributed in two *caballería* lots to agrarian reform beneficiaries.<sup>292</sup> Benefi-

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Sólo los mexicanos por nacimiento o por naturalización y las sociedades mexicanas tienen derecho para adquirir el dominio de las tierras . . . . El Estado podrá conceder el mismo derecho a los extranjeros, siempre que convergan ante la Secretaría de Relaciones en considerarse como nacionales respecto de dichos bienes y en no invocar, por lo mismo, la protección de sus gobiernos por lo que se refiere a aquéllos . . . .

CONSTITUCIÓN tit. I, art. 1, § 27(I) (Mex.). In English, the provision reads:

Only Mexicans by birth or naturalization and Mexican societies [companies] have the right to acquire dominion [ownership] over the lands . . . The State [Mexico] may grant the same right to foreigners, provided they agree, before the Ministry of Foreign Relations, to consider themselves [like] nationals with respect to such property [beneficial agreements] and they do not invoke the protection of their governments against the same [aforementioned].

*Id.*

285. Agrarian Reform Law art. 15.

286. See Navarrete Acevedo, *supra* note 59, at 100 (citing Resolución No. 156 of Mar. 15, 1960).

287. DUMONT, *supra* note 237, at 27-28.

288. *Id.* at 29.

289. *Id.* at 29-30.

290. LAZO, *supra* note 38, at 240.

291. Agrarian Reform Law art. 16; see also Fournier F., *supra* note 48, at 84.

292. Agrarian Reform Law art. 17.

ciaries, be they cooperatives or individuals, were responsible for the appropriate taxes.<sup>293</sup> However, tenant farmers, sharecroppers, and squatters could receive the land free of charge up to the vital minimum.<sup>294</sup> If farm size exceeded the vital minimum but remained five *caballerías* or less, the first two were free of charge through the agrarian reform and the remaining portion could be purchased from the owner by way of a forced sale if on private land,<sup>295</sup> or could be granted free of charge if on state land.<sup>296</sup> Property greater than five *caballerías* was subject to distribution, after payment for any improvements in the land.<sup>297</sup>

Landowners who were subject to expropriation, such as those with more than thirty *caballerías*, were required to submit documentation of ownership for purposes of indemnification.<sup>298</sup> After a final award of a parcel to a beneficiary, the grant could be inscribed at the Rural Property Section of the Property Registries.<sup>299</sup> Any private land not in production two years after the date of the agrarian reform law was subject to expropriation.<sup>300</sup>

In theory, constitutional requirements for indemnification were to be followed. These requirements were based on sale value of the farms, as reflected in municipal assessment statements dated before October 10, 1958, with special provision for subsequent improvements.<sup>301</sup> Prior law had already given the State a preferential purchase right over real property and securities.<sup>302</sup> However, under the agrarian reform, capital gains in property, defined as the value above the amount originally invested, plus additional investment of capital or labor, were not fully paid.<sup>303</sup> Forty-five percent of the "unearned increment" was handed over to the State.<sup>304</sup> It was then

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293. *Id.* art. 17, para. 2.

294. *Id.* art. 16.

295. *Id.* art. 18.

296. *Id.* art. 21, para. 2.

297. *Id.* art. 56.

298. *Id.* art. 25.

299. *Id.* art. 28.

300. *Id.* transitory provision 7.

301. Agrarian Reform Law art. 29. Indemnification at cadastral or tax value has been used in many agrarian reform programs in Latin America. For example, Chile indemnified at the tax appraisal value of the property. See Joseph R. Thome, *Law, Conflict, and Change: Frei's Law and Allende's Agrarian Reform*, in *SEARCHING FOR AGRARIAN REFORM IN LATIN AMERICA* 188, 197 (William C. Thiesenhusen ed., 1989).

302. Agrarian Reform Law art. 57 (referring to Article 89 of the Organic Law of the Republic).

303. *Id.* art. 30.

304. *Id.*



transferred to INRA for the benefit of peasants, and then to the appropriate province, municipality or autonomous body.<sup>305</sup>

Indemnification was to be paid in agrarian reform bonds, a type of public security, with a floating interest rate capped at 4.5%.<sup>306</sup> These bonds were exempt from income tax for the first ten years, if invested in new industries,<sup>307</sup> and this opportunity was extended to heirs of owners.<sup>308</sup>

The tax basis for indemnification was the self-declared value owners had used for payment of property taxes.<sup>309</sup> This was the same method used by Guatemala, Bolivia,<sup>310</sup> and other Latin American countries.<sup>311</sup>

Despite the law's requirement of compensation, the Cuban government's agrarian reform program paid relatively low prices for the land they expropriated.<sup>312</sup> By 1961 the Cuban government had issued bonds for \$8,900,000 in compensation for 4,400,000 hectares of land.<sup>313</sup> The Venezuelan government, with a far less radical land reform (between 1960 and 1963), paid \$57,380,000 (roughly six times the Cuban amount) for 579,000 hectares.<sup>314</sup> This amounts to roughly about one seventh of the total land area for Venezuela of 88,205,000 hectares.<sup>315</sup>

#### *e. Redistributed Agricultural Property*

Property received under agrarian reform carried with it restrictions. It could not be used for commercial businesses, other than

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305. *Id.*

306. *Id.* art. 31.

307. *Id.* art. 32.

308. *Id.*

309. *Id.* art. 29.

310. MENIVAR, *supra* note 241, at 396.

311. Cuban legislation used the 1958 tax return as evidence of property value. Harper, *supra* note 266, at 777. Similarly, Peru used 1968 income tax returns to determine property value. *Id.* One commentator noted that "this system [was] naturally beneficial to the honest taxpayer, and detrimental to the dishonest one." *Id.*

312. MENIVAR, *supra* note 241, at 406-07

313. *Id.* at 407

314. *Id.* at 407-08.

315. *Id.*

farmers' cooperatives.<sup>316</sup> Property could only be transferred by inheritance, sale to the State, or by a sale authorized by INRA.<sup>317</sup> The land could not be leased, mortgaged, or sharecropped, and no one else could be given a usufructuary interest in the land.<sup>318</sup> The only exception involved asset-based lending to small farmers from the State or from quasi-governmental institutions.<sup>319</sup>

The law also took steps to prevent fragmentation of land.<sup>320</sup> It mandated that when parcels did change hands, as in inheritance, the land could only pass in whole to a single heir.<sup>321</sup> Where more than one heir had a valid claim on the land, as described in Article 1067 of the Civil Code, then the lot was to be sold at auction to qualifying peasants or agricultural workers.<sup>322</sup> The proceeds were then to be divided among the heirs, assuming the heirs were also peasants or agricultural workers.<sup>323</sup>

Gender issues were also considered in the agrarian reform legislation. In cases of common law marriage, if the land was jointly occupied for at least one year, the community property legislation for stable, extramarital unions was applicable.<sup>324</sup>

CUBA COMPARED WITH OTHER JURISDICTIONS: AREA EXPROPRIATED						
Country	Period	No. of Years	Area Redistributed in Hectares (000)	Total Land Area (km <sup>2</sup> ) in the country	Percent of land redistributed (as % of total land area)	Average Redistributed in Hectares/ year
Mexico	1915-1962	47	52,000	1,923,040	27	1,106,000
Bolivia	1952-1962	10	4400	1,034,390	4	440,000
Venezuela	1960-1963	3	579	882,050	1	193,000
Italy	1950-1958	8	750	294,020	3	94,000
Japan	1946-1949	3	2000	374,744	5	666,000
Guatemala	1953-1954	1.5	606	108,430	6	414,000
Cuba	1959-1961	2	4400	110,860	40	1,200,000

*Id.* at 406. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 1993 47, 98, 193, 198, 159, 255, 410 (1993) (for total land area in the individual countries). 100 hectares = 1 square kilometer (km<sup>2</sup>).

316. Agrarian Reform Law art. 33.

317. *Id.* art. 34.

318. *Id.* These restrictions are typical in Latin America. See Hendrix, *supra* note 51, at 8-12.

319. Agrarian Reform Law art. 34, para. 2.

320. See generally Agrarian Reform Law.

321. *Id.* art. 35. See also Fournier F., *supra* note 48, at 88.

322. Agrarian Reform Law art. 35.

323. *Id.*

324. *Id.* art. 36. Compare with Hendrix, *supra* note 51, at 13-14 (discussing other Latin American jurisdictions).

*f. Agrarian Development Zones*

As a part of agrarian reform, INRA was granted the power to declare "agrarian development zones,"<sup>325</sup> with each zone considered a discrete administrative unit.<sup>326</sup> These zones could be subdivided into sections for better management.<sup>327</sup> A variety of factors were considered in delineating each zone, including the following: (1) areas best suited for property registration, population census, agricultural research, and surveying; (2) agrological characteristics; (3) population centers or settlements, state aid centers, peasant farmers' associations, cooperatives, and local police stations; (4) hydrological resources; (5) small, supplementary rural industries; and (6) existing communications facilities.<sup>328</sup> State aid centers were to provide agricultural machinery, equipment, granaries, storehouses, warehouses, transportation, research facilities, electricity, and other assistance, such as schools with boarding facilities, rural maternity homes, first aid stations, dispensaries for medical and dental care, libraries, athletic facilities, and cultural outlets.<sup>329</sup>

The agrarian reform law expressly provided a stated preference for cooperatives, with management appointed by INRA.<sup>330</sup> On cooperatives, members were to personally work the land.<sup>331</sup>

*g. The National Agrarian Reform Institute*

INRA was charged with overseeing agrarian reform.<sup>332</sup> INRA was an autonomous entity with its own legal personality.<sup>333</sup> The Cuban Council of Ministers held the power to appoint INRA's president and an executive director.<sup>334</sup> Local committees, under the supervision of INRA, would be charged with enforcement.<sup>335</sup> INRA's powers included the following: (1) carrying out research; (2) proposing tax measures; (3) proposing tariff protections; (4) coordinating housing, health, and education improvement efforts within the rural population; (5) defining agrarian development zones; (6) directing the review

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325. Agrarian Reform Law art. 37. *See also* Fournier F., *supra* note 48, at 88.

326. Agrarian Reform Law art. 42.

327. *Id.* art. 38.

328. *Id.* art. 40, paras. 1-6.

329. *Id.* art. 41.

330. *Id.* art. 43.

331. *Id.* art. 44.

332. *Id.* art. 48. *See also* CHIUMINATTO C., *supra* note 53, at 78.

333. Agrarian Reform Law art. 48.

334. *Id.* art. 48, para. 2.

335. *Id.* art. 52.

of land distribution, the establishment of state aid offices, and the conveyancing of lands; (7) carrying out development plans; (8) drafting regulations for cooperatives; (9) direct training in cooperatives; (10) managing resettlements, land awards, distribution and other aspects of the agrarian reform; (11) establishing its own budget and administering its own funds; (12) performing its own agricultural census every five years; (13) establishing internal rules; and (14) linking with international associations where appropriate.<sup>336</sup> On the other hand, the agrarian reform law did not apply to rural property occupied by tenant farmers and squatters that<sup>337</sup> Additionally, the Revolutionary Army was given a coordinating role in the functioning of INRA.<sup>338</sup>

INRA also managed aspects of agricultural credit and extension. It was charged with establishing a credit department<sup>339</sup> and contributing to efforts for the coordination of policy with the agricultural division of the Agricultural and Industrial Development Bank of Cuba.<sup>340</sup> For its part, the State was charged with helping INRA provide agricultural and livestock development units throughout the country to provide access to the following: (1) equipment and machinery; (2) agronomical or zoological research; and (3) technical assistance.<sup>341</sup>

In 1966, property belonging to smallholders no longer capable of farming due to age or disability was transferred to INRA under special rules.<sup>342</sup> The smallholder was allowed to remain in any housing on the premises (if that were the owner's only home), along with a small plot of land ten meters around the home, for the purpose of self-consumption gardening.<sup>343</sup> This occupation of land was considered a gratuitous usufructuary interest.<sup>344</sup> In return, the smallholder received a stipend from the government.<sup>345</sup> These stipend benefits could be passed on through inheritance to a spouse, companion, or other family member who was incapacitated, lacked means for living, or lived with the decedent.<sup>346</sup>

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336. *Id.* art. 48, paras. 1-14.

337. *Id.* art. 58.

338. *Id.* final provision 4.

339. *Id.* art. 49.

340. *Id.*

341. *Id.* art. 50(a)-(c).

342. See Navarrete Acevedo, *supra* note 59, at 100-01 (citing Resolución No. 120 (April 20, 1966) (Cuba) [hereinafter Resolution No. 120]).

343. *Id.* at 100 (discussing the effect of Resolution No. 120).

344. *Id.*

345. *Id.* at 100-01.

346. *Id.* (citing Resolución No. 177 (Nov. 30, 1967) (Cuba) [hereinafter Resolution No. 177]).

Furthermore, *tribunales de tierra* (special land tribunals) were permitted to address claims arising from the agrarian reform legislation, as well as other issues related to agricultural contracts and rural property.<sup>347</sup> Special resolution gave INRA the power to authorize sales, grants, cession, alienation, or transfer of any agricultural property.<sup>348</sup> Additionally, the state was required to establish forest reserves and national parks, with a view towards soil conservation and preservation of forests.<sup>349</sup>

#### *h. Individual Versus Collective Ownership*

##### *i.—Historic Background*

Law Number 3 of the Sierra Maestra, dated October 10, 1958, did not address cooperatives or state farms.<sup>350</sup> Subsequently, under the agrarian reform law, farmers began to organize into farmer associations. Groups were often encouraged to sell property to the government and join the state farms.<sup>351</sup> By 1978, 137,000 small private farmers remained, on an average farm size of 12.6 hectares; this represented about 20% of total crop and pasture land or 1,736,816 hectares.<sup>352</sup>

As a result, Cuba had a higher degree of collectivization than most Socialist countries.<sup>353</sup> Cuban agricultural cooperatives (similar to the Russian *kolkhozy*) were converted into state farms (similar to the Russian *sovkhozy*) by mid-1962.<sup>354</sup> Nevertheless, workers were allowed to retain a small portion of land for individual self-production.<sup>355</sup> In 1967, however, this practice was stopped, reportedly because workers spent more time on their individual plots than on state land.<sup>356</sup>

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347. Agrarian Reform Law art. 54. In fact, these tribunals never came into existence. See Navarrete Acevedo, *supra* note 59, at 101.

348. See Navarrete Acevedo, *supra* note 59, at 99-100 (citing Resolución No. 113 (Dec. 31, 1959) (Cuba) [hereinafter Resolution No. 113]).

349. Agrarian Reform Law art. 55.

350. LAZO, *supra* note 38, at 242.

351. Rathbone, *Farmland*, *supra* note 251, at 2.

352. *Id.*

353. Carmelo Mesa-Lago, *The Revolutionary Offensive*, in CUBAN COMMUNISM, *supra* note 139, at 75.

354. *Id.*

355. Within the Socialist block, most land was held as *kolkhozy*, except in Poland and Yugoslavia, where the majority of land was still held by private farmers. See *id.*

356. *Id.*

In the old Soviet Union, small garden plots accounted for almost a third of total agricultural production.<sup>357</sup> There is anecdotal evidence from Cuba that small private plots might have made similar contributions.<sup>358</sup> One estimate in 1963 placed work productivity on state farms at half that of private farms.<sup>359</sup>

Collectivization in Cuba was encouraged in part because of the belief that centralization of machines would ensure full employment.<sup>360</sup> Consultants claimed that small farmer production had failed in Bolivia and Mexico while the International Food and Agriculture Organization of the United Nations (FAO) asserted small producers had restricted modernization in Jamaica.<sup>361</sup> Cuba was thus encouraged to collectivize production.<sup>362</sup>

After 1974, with government encouragement and incentives, organization of *Cooperativas de Producción Agropecuaria* (agricultural production cooperatives) (CPAs) increased.<sup>363</sup> From 1977 to 1984, the number of CPA's ballooned from 44 to 1414.<sup>364</sup> Membership jumped from 365 to 72,500, and the area of land used by CPAs increased from 6052 hectares to 1,083,292 hectares.<sup>365</sup>

In 1989, CPAs accounted for 7.8% of Cuban land (868,200 hectares) and was comprised of 1353 associations, representing 64,000

357. William C. Thiesenhusen, Presentation on Private Property Conversion in Russia Before the Organization of American States Conference on Tenure Change in Formerly Socialist Economies (Sept. 18, 1992) (notes from presentation on file with author) [hereinafter Thiesenhusen Presentation].

358. For a general discussion of the increasing role of small private farming in Cuba, see Carmen Diana Deere, *Socialism on One Island? Cuba's National Food Program and Its Prospects for Food Security*, 124 INST. OF SOC. STUD. WORKING PAPER SERIES 38, 39 (1992).

359. DUMONT, *supra* note 237, at 74.

360. *Id.* at 54.

361. *Id.* at 32-33.

362. *Id.*

DISTRIBUTION OF AGRARIAN REFORM PROPERTY IN MAY 1961	
<i>Granjas del Pueblo</i> (state farms)	2,433,449 hectares
Cane cooperatives	899,119 hectares
Private Property	1,196,311 hectares
Total area affected by the Agrarian Reform	4,438,879 hectares

MENJIVAR, *supra* note 241, at 407.

363. See Asesores para el Avance Social et al., *Perfil de Proyecto: El Cambio en el Manejo de las Empresas Agropecuarias en Cuba: De Empresas Estateles a Cooperativas* (1995) (on file with the Land Tenure Center Library, University of Wisconsin) [hereinafter Cuba Project Paper] (stating that CPAs are regulated under Ley 36 of July 1992).

364. Rathbone, *Farmland*, *supra* note 251, at 2.

365. *Id.*

workers.<sup>366</sup> The average farm had 647 hectares with 47 workers.<sup>367</sup> CPAs mainly engaged in export crops, usually sugar (43% of CPA land and labor), tobacco (10% of CPA land and 15% of CPA labor), and coffee (15% of CPA land and 13% of CPA labor).<sup>368</sup>

CPA membership was divided between "contributory members"—those who had donated property—and "noncontributory members"—those who had not donated any property to the CPA.<sup>369</sup> Many noncontributing members were family members of the contributing membership.<sup>370</sup> In fact, few CPA members were outsiders.<sup>371</sup> Those outsiders who did become members usually represented a specialized trade or skill. Nationwide, about thirty-eight percent of membership was classified as "contributory."<sup>372</sup>

Members were encouraged to contribute assets to the association and were compensated for that contribution.<sup>373</sup> Contributions could take the form of cattle, machinery, or other assets. All contributions were valued carefully.<sup>374</sup> Compensation was paid over a five to seven year period, with twenty-five to thirty percent of a CPA's net profits

366. *Id.* at 3.

367. *Id.*

368. *Id.*

AGRARIAN REFORM AND GROUP FARMING AS A RESULT OF AGRARIAN REFORMS IN LATIN AMERICA, VARIOUS RECENT YEARS					
General Data on Group Farming in the Caribbean and Central America					
	El Salvador	Honduras	Nicaragua	Guatemala	Dominican Republic
Number of Group Farms	317	1939	1110	67	131
Total Area (hectares)	214,049	294,424	448,104	NA	61,499
Number of members	31,359	48,129	22,823	2993	15,676
Type of Enterprise	Cooperativas (1st phase of agrarian reform)	Asentamientos, Cooperativas, Empresas Agrarias	Cooperativas Agrarias Sandinastas (CAS)	Cooperativas de Padre Girón and others	Asentamientos Colectivos
Date	1985	1985	1985	1987	1983

J. David Stanfield & Malcolm Childress, *The Viability of Group Farming Ownership Models for Central America: A Comparison of the Honduran and Salvadoran Cases* (1989) at 3 (unpublished manuscript on file with the Land Tenure Center Library, University of Wisconsin).

369. Rathbone, *Farmland*, *supra* note 251, at 3.

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

being set aside specifically for compensation purposes.<sup>375</sup> In response to the 1974 initiative by the government, by 1981, sixty-four percent of CPA land had been contributed by members, and twenty percent by the state (representing a conversion of state farms into CPAs).<sup>376</sup>

CPAs were difficult to classify as either private or public, because they displayed characteristics of both. In terms of public characteristics, the CPAs shared similarities with public entities that had an organizational structure resembling public entities and specialized labor brigades.<sup>377</sup> In addition, CPA property was not inheritable, and was required to produce a state-determined output.<sup>378</sup> Statutes classified them as privately owned and they had the right to divide or merge with other CPAs.<sup>379</sup> Furthermore, CPA members were free to enter and leave.<sup>380</sup> Still, the main deterrent to leaving the CPA was the inability to take any property upon departure, except for contributory property for which the worker had not received any compensation.<sup>381</sup> As a result, the CPAs were a hybrid of public and private interests.<sup>382</sup> Nevertheless, first generation workers tended to classify themselves with the private sector, while second generation workers identified more with wage workers on state farms.<sup>383</sup>

Similarly, in 1992, Cuba's private agriculture sector was small. Only about 9.7% of total island land and just 3% of the agricultural workforce were employed in private sector agriculture.<sup>384</sup> Farmers in this sector were often elderly, with their children only rarely following in their footsteps.<sup>385</sup> There was no formal pension arrangement, and farmers received only limited health benefits.<sup>386</sup> In retirement, farmers could elect to sell the family farm to a state or association, in effect establishing a funding mechanism for retirement or health expenses.<sup>387</sup> To overcome some of these obstacles, most small farmers joined a *Cooperativas de Crédito y Servicio* (Credit and Service Coop-

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375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.* at 4.

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*



erative) (CCS).<sup>388</sup> These cooperatives served as a conduit for receipt of state inputs and technical assistance.<sup>389</sup> Farmers not members of a CCS were typically dispersed subsistence farmers.<sup>390</sup>

In 1989, CCS members held about 7.6% of national land, about 833,100 hectares.<sup>391</sup> These farms produced tobacco and specialized crops like vegetables (especially tomatoes), coffee, and bananas.<sup>392</sup> Production was marketed to the state through negotiated quotas, and land, equipment, and produce remained privately held.<sup>393</sup> Members shared some installations and services.<sup>394</sup> That same year, dispersed private farms occupied only 2.2% of Cuban territory, approximately 249,000 hectares, mainly in the eastern half of the country.<sup>395</sup> These were generally self-sufficient farms engaged in growing a range of crops and livestock.<sup>396</sup>

*ii.—The Second Agrarian Reform Law (1963)*

The second agrarian reform law<sup>397</sup> had its roots in the continued conflict with Cuban owners of large estates and the United States boycott.<sup>398</sup> Despite the efforts of the initial reform law, a poor asset distribution continued, with seven percent of farmers each owning seventy-six hectares constituting forty-seven percent of all private landholdings.<sup>399</sup> About twenty-five percent of all cultivable land on the island still remained in the hands of about one percent of the population at the end of the first agrarian reform law.<sup>400</sup>

This legislation sought to: (a) advance further the dismantling of large estates; (b) reduce the maximum landholdings per person to five *caballerías*; (c) proclaim the expropriation of all farms above the size

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388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.* at 5.

396. *Id.*

397. See MENJIVAR, *supra* note 241, at 409 (discussing Segundo Ley de Reforma Agraria (Oct. 3, 1963) (Cuba) [Second Agrarian Reform Law]).

398. For example, the fourth whereas clause of the Second Agrarian Reform Law specifically refers to *imperialismo yanqui* (yankee imperialism) and *burgueses rurales* (rural bourgeois). *Id.* at 410. The use of this language underscores the distinctly political, rather than economic or technical, nature of the second agrarian reform.

399. Fournier F., *supra* note 48, at 92.

400. *Id.*

per person limit of five *caballerías*, unlike the first agrarian reform law which allowed for the continuation of some larger farms.<sup>401</sup>

The new legislation was in some degree a response to a deterioration in Cuban-U.S. relations.<sup>402</sup> The law mandated the expropriation of all farms larger than five *caballerías*.<sup>403</sup> However, the same two exceptions from expropriation for larger farms applied; cooperatives where land per person remained five *caballerías* or less and high productivity farms were exempt from expropriation.<sup>404</sup>

The second agrarian reform law resulted in the following reforms: (a) state agricultural ownership of fertile lands increased to 70%; (b) remnant large estates from the first Agrarian Reform Law were eliminated; (c) the "Socialist agricultural transformation" was viewed as complete.<sup>405</sup>

### iii.—New Liberalizations

From 1982 to September 1995, 212 foreign investors had formed joint venture companies with local participation,<sup>406</sup> representing about \$2 billion in foreign investment into Cuba.<sup>407</sup> The U.S.-Cuba Trade and Economic Council calculated that, as of August 1995, approximately \$4.9 billion in foreign investment had been announced, of

401. Navarrete Acevedo, *supra* note 59, at 97.

402. See MENJIVAR, *supra* note 241, at 410 (discussing the Cuban missile crisis of October 1962). According to Carlos Rafael Rodríguez, "Diferir la segunda reforma agraria hubiera sido comprometer por mucho tiempo el desarrollo agropecuario de Cuba." *Id.* In translation this provision reads: "To defer the second agrarian reform would compromise, for too long, the development [unfolding] of Cuban agricultural concerns." *Id.*

403. Navarrete Acevedo, *supra* note 59, at 97.

404. *Id.* at 98.

405. *Id.* at 99.

DISTRIBUTION OF AGRARIAN REFORM LAND: STATE VS. PRIVATE OWNERSHIP			
Year	1959: After the first agrarian reform law	1963: Before the second agrarian reform law	1963: After the second agrarian reform law
Percent State Ownership of Land	40	52	71
Percent Private Sector Ownership of Land	60	48	29

OSCAR TRINCHET VIERA, LA COOPERATIVIZACIÓN DE LA TIERRA EN EL AGRO CUBANO 24 (1984).

406. Castro Says Approval of Investments Will be 'Flexible' but Subject to Scrutiny, *supra* note 17.

407. Douglas Farah, *Havana Swings Its Doors Open Wider*, INT'L HERALD TRIB., Sept. 6, 1995, available in LEXIS, News Library, Int File [hereinafter Farah, *Havana*]. Prior to 1982, no foreign investments were permitted in Cuba. See Lionel Martin, *Cuba to Free Up Investment Laws*, GUYANA CHRON., Sept. 4, 1995, at 8; José de Córdoba, *Cuba Will Allow Foreigners to Own 100% of Firms*, WALL ST. J., Sept. 5, 1995, at A11.

which \$556 million had been formally committed.<sup>408</sup> Presently, a Mexican joint venture is fixing Cuba's telephone system, French and Russian companies are completing the Jaragua nuclear power plant, and other long-term infrastructure projects are advancing with foreign financing.<sup>409</sup> Japanese cars, British gasoline stations, and Spanish hotels have become common across Cuba.<sup>410</sup>

In this spirit, the Cuban government has dramatically altered its philosophy and approach towards state farms and CPAs.<sup>411</sup> However, Cuban historian Carmelo Mesa-Lago suggests that the new liberalizations are perhaps best understood as measures to perfect socialism, rather than a wholesale move to capitalism. Today, tensions within the government are increasing because moderate reformers, who do not advocate capitalism but want to introduce market mechanisms, are opposed by orthodox hard-liners who resist these crucial changes.<sup>412</sup>

"Castro permitted some limited market-oriented reforms to be enacted in mid-1993," Mesa-Lago says, "but he apparently is trying to halt further change . . . [t]he pressure from below for reforms has been enormous but Fidel has been reluctant to make domestic changes because he is afraid changes will lead to what happened in Eastern Europe."<sup>413</sup> Despite additional reforms in 1995, the Cuban government clearly indicated that the new provisions did not mean Cuba was in the process of giving up its Marxist revolution.<sup>414</sup>

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408. Douglas Farah, *Foreign Investors Finding Cuba More Comfortable - With U.S. Away*, WASH. POST, Sept. 12, 1995, at A14 [hereinafter Farah, *Foreign Investors*].

409. *Id.*

410. John Rice, *Cuba Debates Foreign Investment*, AUSTIN AM.-STATESMAN, Sept. 5, 1995, at A5, available in 1995 WL 6103917.

411. Mimi Whitefield, *Cuba Turns State-Owned Farms into Private Operations*, LAS VEGAS REV.-J., Nov. 25, 1993 at 8C; Mimi Whitefield, *Cuba Relaxes Farm Rules to Boost Food Production*, MORNING NEWS TRIB. (Tacoma, Washington), Sept. 16, 1993, at C7, available in 1993 WL 8762437. For other changes in the banking sector, see Dalia Acosta, *Economy—Cuba: No Readjustment Without Banking Reform*, Inter Press Service, Jan. 2, 1996, available in LEXIS, News Library, Wires File.

412. Deibler, *supra* note 160, at D4. Geralyn Pye, from the Flinders University of South Australia, argues that there has been a considerable amount of self-criticism and reform in Cuba in recent years. See Geralyn Pye, *Cuba Since the Fourth Congress*, Paper Presented at the Latin American Studies Association Meeting, Washington, D.C. 2 (Sept. 28-30, 1995) (on file with author) [hereinafter LASA Meeting]. Cuban rhetoric continues to reaffirm a commitment to Marxism-Leninism. *Id.* But in practice, Marxism-Leninism is defined increasingly broadly, and Cuban policy more and more represents a pragmatic response to the severe economic difficulties it has encountered since the mid-1980's. *Id.*

413. Deibler, *supra* note 160, at D4.

414. Farah, *Havana*, *supra* note 407, at A14.

Specifically with regard to the 1995 Foreign Investment Law, Ernesto Melendez, Minister of Foreign Investment, stated, "This law regulates and opens broad avenues for foreign investment. But it is not inspired by neoliberalism, and its goal is not a transition to capitalism."<sup>415</sup> Osvaldo Martinez, who sponsored the law as chairman of the Economic Committee, claimed, "This is an opening to defend and develop socialism," and not one that is inspired by capitalist economics.<sup>416</sup> On this same legislation, Fidel Castro classified the law as "broad and quite radical," aimed at adapting the Cuban economy to the "new realities of today's world."<sup>417</sup> However, Castro emphasized that "[t]hat does not mean in any way a return to capitalism, much less beginning a crazy race in that direction."<sup>418</sup> John Kavulich, president of the U.S.-Cuba Trade and Economic Council, asserted that the new foreign investment law is a "transitional document" and James Whisehand, a Miami attorney and author of a Cuba business newsletter characterized the law as a "zig-zag motion with a net forward gain towards more free-market activity."<sup>419</sup>

Since September 1993, about eighty percent of the state farms have been broken into *unidades básicas de producción cooperativa* (basic units of cooperative production) (UBPC).<sup>420</sup> In short, the Cuban leadership has abandoned its previous ideological commitment to state farms as the preferred form of Socialist agricultural production.<sup>421</sup> However, the extent of change to the basic philosophy is debatable.<sup>422</sup>

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415. Douglas Farah, *Cuba Approves Law Promoting Foreign Interest*, L.A. TIMES, Sept. 6, 1995, at D1 [hereinafter Farah, *Cuba*].

416. Rice, *supra* note 410, at A5.

417. *Cubans to Discuss New Investment Law*, UPI, Aug. 31, 1995, available in LEXIS News Library, UPI File.

418. *Id.*

419. de Cordoba, *supra* note 407, at A11.

420. Nahela Becerril Albarran & Victor Figueroa Albelo, *Tenencia de la Tierra y Cooperativización Agrícola en Cuba* (May 12, 1994) (unpublished manuscript on file with the Land Tenure Center Library, University of Wisconsin) (citing Decreto Ley No. 142 (Sept. 20, 1993) (Cuba) [hereinafter Decree Law No. 142]). Cuba Project Paper, *supra* note 363, at 1. Messina Presentation, *supra* note 11.

421. Deere Testimony, *supra* note 16, at 2; Indeed, the legislation itself notes that Articles 15 and 17 of the Constitution allow for Socialist state property to be transferred to legal entities or individuals on an exceptional basis, and it is this authority that creates the UBPC's. See Decree Law No. 142, whereas cl. 1.

422. Victor Figueroa Albelo, *Rural Development and Cooperatives Group*, Universidad Central de las Villas, *Hacia una Fórmula Cooperativa del Sector Estatal Agrícola en Cuba iii* (Jan. 15, 1995) (unpublished manuscript on file with the Land Tenure Center Library, University of Wisconsin). Geralyn Pye argues that it is difficult to identify a clear direction in Cuban policy over the past few years. See Pye, *supra* note 412, at 2.

Articles 14, 15, and 17 of the 1992 Constitution allow for state lands to be transferred to the private sector.<sup>423</sup> The resulting new UBPC is a type of cooperative designed to replace the state farm sector.<sup>424</sup> An estimated 4000 cooperatives will be created out of 385 former state farms affecting 82.3% of national agriculture lands or 500,000 workers.<sup>425</sup> By May of 1995, state farms accounted for only 25% of Cuban territory, while UBPCs held 55% of the land.<sup>426</sup>

Another initiative within the rubric of dismantling state farms is a land access program that would provide landless peasants, or groups who organize as a UBPC, with the opportunity to use former state farms.<sup>427</sup> The land can be used for subsistence farms or for tobacco production. Further use possibilities include coffee, vegetables, or other products.<sup>428</sup> Self-consumption lots were originally half a hectare (twelve *cordeles*) in size, although this has been reduced to a quarter of a hectare (six *cordeles*). In 1993 and 1994, 2000 new small cooperatives were brought into this system,<sup>429</sup> about 1556 of these in the sugar sector, representing about eighty thousand cooperative farmers.<sup>430</sup> Still other state lands are being incorporated into existing CPAs.<sup>431</sup>

There were six legislative objectives underlying the creation of the UBPCs.<sup>432</sup> First, UBPCs were created to affect the relationship between the farmer and results. Second, UBPCs aimed to ensure self-sustaining agricultural production for the farmer, his family, and the community. Third, the UBPCs were created to improve worker life and housing conditions. Fourth, UBPCs aimed to encourage strong association of increased quality of life and personal income with work results. Fifth, development of self-management for the UBPC was an-

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423. Figueroa Albelo, *supra* note 422, at 3 (citing Decree Law No. 142, whereas cl. 1 and the 1992 CONSTITUTION).

424. Figueroa Albelo, *supra* note 422, at 1.

425. *Id.* at 3.

426. Jennifer Abbassi, Lessons from the Farmers Markets in Cuba, Then (1980-1986) and Now, Paper Presented at the LASA Meeting, *supra* note 412, at 8.

427. Figueroa Albelo, *supra* note 422, at 1; Beatriz Díaz, Biotecnología Agrícola: Estudio de Caso en Cuba, Paper Presented at the LASA Meeting, *supra* note 412, at 14. A number of local economists note an increase in the number of young people returning to the land. See Abbassi, *supra* note 426, at 14.

428. Figueroa Albelo, *supra* note 422, at 2.

429. *Id.*

430. *Id.*

431. *Id.*

432. Lupo Nuñez Rodriguez, Asociación Nacional de Economistas de Cuba, Evolución de la Organización Empresarial Agropecuaria en la Cuba Revolucionaria, Presentation at the LASA Meeting, *supra* note 412, at 13.

ticipated. Sixth, UBPCs were developed with the idea of voluntary participation by workers.

By the end of 1993 the new UBPC sector already encompassed about 26.5% of national lands.<sup>433</sup> State agricultural enterprises still held about 47.5% of lands, with about 8.5% of lands in other state entities.<sup>434</sup> CPAs accounted for 8% of land, with independent farmers occupying about 10.5% of the island.<sup>435</sup> However, the distribution has not been uniform nationally. For example, the Havana Province contained CPAs and peasants on about 40% of its lands, with UBPC's and the Ejército Juvenil del Trabajo (Young Worker's Army) (EJT) on the remaining 60%.<sup>436</sup>

UBPCs are allowed a high degree of self-management through a general assembly of its members and an elected administration board.<sup>437</sup> The *asamblea general* (the general assembly) is the highest decision-making authority of the UBPC.<sup>438</sup> The *junta administracion* (the administrative board) is the executive and administrative organ of the UBPC.<sup>439</sup> The administrator is the highest legal representative

433. Figueroa Albelo, *supra* note 422, at 4.

DISTRIBUTION OF UBPCs AS OF JUNE 1995			
Type of UBPC	Number of Cooperatives	Number of Members	Areas received in usufruct (in hectares)
Sugar Cane	1296	133,685	1,680,000
Non-Sugar Cane	1558	132,087	1,510,000
Total	2854	265,772	3,190,000

Díaz, *supra* note 427, at 3.

434. Figueroa Albelo, *supra* note 422, at 4.

435. *Id.*

436. *Id.*

TENURE FORM	1977		1987	
	Number of Units	Areas (Hectares)	Number of units	Area (Hectares)
I. State Businesses		8,351,700		8,671,400
II. Cooperative Property (CPA)	296	45,200	1418	935,000
III. Usufruct (CPS, Ind.)	0	0		89,000
IV. Economic Parcel				
A. Employed Worker	0	0	31,912	89,300
B. Other Private	0	0	22,771	77,800
Total		10,381,500		11,071,400

Becerril Albarran & Figueroa Albelo, *supra* note 420, at 26. The total line reflects total agricultural land area, not necessarily the column total.

437. Díaz, *supra* note 427, at 2.

438. Figueroa Albelo, *supra* note 422, at 24. The General Assembly, Administrative Board, and Administrator positions were created by Resolución No. 354/93, arts. 6, 10-13 (Sept. 28, 1993) (Cuba) [hereinafter Resolution No. 354/93].

439. Figueroa Albelo, *supra* note 422, at 4.

of the UBPC and ensures compliance with the General Assembly and the Administrative Board Decisions.<sup>440</sup> They select their own members, establish capitalization requirements, elect four managers, set self-consumption levels, and make other relevant management decisions.<sup>441</sup> Land assets of the UBPC remain state property.<sup>442</sup> Yet, the UBPCs maintain an indefinite usufructuary interest<sup>443</sup> in the land,<sup>444</sup> an interest typically inscribed at the official registry.<sup>445</sup> With this type of property interest, UBPC members (*ubepecistas*) effectively manage a voluntary, private cooperative, and own what they produce.<sup>446</sup>

The UBPC is a "social and economic organization" made up of workers with autonomous power, and with its own juridical personality.<sup>447</sup> In this sense, the UBPC manages the factors of production on its own behalf. This includes internal organization of labor, contracting of any outside labor needed, negotiation of credit with banking officials, designation of any self-consumption levels, and setting of organizational structure and remuneration.<sup>448</sup>

440. *Id.*

441. *Id.*

442. *Id.* at 20.

443. Decree Law 142 art. 2(a); Díaz, *supra* note 427, at 25 (citing Acuerdo del Buro Político (Sept. 10, 1993) (Cuba) [hereinafter Political Bureau Agreement]).

444. Figueroa Albelo, *supra* note 422, at 20 (citing Decree Law No. 142 art. 2).

445. *Id.*

446. Deere Testimony, *supra* note 16, at 5.

447. Decree Law No. 142, art. 2; Resolution No. 354/93 art. 1; Becerril Albarran & Figueroa Albelo, *supra* note 420, at 17; Figueroa Albelo, *supra* note 422, at 24. The exact nature of the UBPC legal personality is at this stage still evolving. See José Luís Martín Romero, Los Sindicatos Cubanos Ante la Crisis Actual, Paper Presented at the LASA Meeting, *supra* note 412, at 8.

LISTING OF PUBLIC VERSUS PRIVATE CHARACTERISTICS OF THE UBPCs.	
Public Characteristics	Private Characteristics
The mother state enterprise retains ownership over the land.	UBPCs can own nonland property.
The mother state enterprise retains the exclusive rights to sale of inputs to the UBPCs, and to purchase of UBPC outputs, at price levels which are centrally controlled.	Autonomous management of production
UBPCs must seek optimal levels of production, not optimal economic behavior.	Members retain benefits of increased productivity.
The state provides subsidized credit opportunities for UBPCs.	Invests collective capital.

See Deere Testimony, *supra* note 16, at 5, 11.

448. Figueroa Albelo, *supra* note 422, at 25; Becerril Albarran & Figueroa Albelo, *supra* note 420, at 17.

There are several external problems facing UBPCs in Cuba.<sup>449</sup> Water and land quality depend on whatever the State provides.<sup>450</sup> The amount and disposition of cooperative credit and the amount of existing debt are also problems.<sup>451</sup> In addition, there are difficulties in assuring a favorable and stable market for production.<sup>452</sup> Finally, cooperative regulatory legislation can limit decentralized and flexible development by requiring a specific organizational structure.<sup>453</sup>

The relationship between the UBPC and the state has changed dramatically under the new arrangement.<sup>454</sup> Many legal restrictions in management decision-making have been removed.<sup>455</sup> Still, despite legal autonomy from the state, the UBPCs remain dependent on the state for credit access and usufructuary rights.<sup>456</sup> These factors limit the commercial autonomy of the new cooperatives.<sup>457</sup>

Further, the functions of the UBPC are redefined through political processes.<sup>458</sup> Ministries of Sugar and Agriculture continue to have some organizational and directional oversight over the UBPCs.<sup>459</sup> Additional regulations from the Ministry of Sugar (MINAZ) and the Ministry of Agriculture (MINAG) further circumscribe UBPC activity.<sup>460</sup> External economic relationships between UBPCs are nearly impossible, as any such transactions would require prior approval from the state.<sup>461</sup>

UBPCs have been extended through much of the sugar cane industry. Between September and December of 1993, 1556 sugar cane UBPCs were organized, accounting for about ninety percent of the land previously in the hands of state sugar entities *complejos*

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449. Cuba Project Paper, *supra* note 363, at 3.

450. *Id.*

451. *Id.*

452. *Id.*

453. *Id.* See also Nuñez Rodriguez, *supra* note 432, at 15.

454. Figueroa Albelo, *supra* note 422, at 26.

455. *Id.*

456. *Id.*

457. *Id.* The July 7, 1995 issue of the periodical *Bohemia* reports that self-management still has not been achieved. *Id.* There is still no autonomy, *Bohemia* argues. *Id.* In this regard, UBPC's are "autonomous to lose and pay" and UBPC's are still under the "lens of paternalism." See Nuñez Rodriguez, *supra* note 432, at 15.

458. Figueroa Albelo, *supra* note 422, at 27 (citing Political Bureau Agreement).

459. Figueroa Albelo, *supra* note 422, at 27 (citing El Acuerdo No. 2703 del Comité Ejecutivo del Consejo de Ministros (Sept. 21, 1993) (Cuba) [Agreement No. 2703 from the Executive Committee of the Council of Ministers] [hereinafter Agreement No. 2703]).

460. Figueroa Albelo, *supra* note 422, at 27-28.

461. Agreement No. 2703 7th cl.



*agroindustriales* (CAIs).<sup>462</sup> Mixed cultivation state enterprises are now experimenting with the new organizational structure of UBPC. By January 1994, 816 UBPCs with 81,000 members had been organized.<sup>463</sup> The UBPC structure has been extended to dairy and livestock production in the province of Holguin since January 1994, and the province of Havana since March 1994.<sup>464</sup>

There are also several problems associated with UBPCs in Cuba.<sup>465</sup> First, joint owners often rank consumption needs over cooperative capital and skill investment. Second, there is no practical need or legal mechanism (like commercial or business shares) to assure that a joint owner will recoup future investments made into the enterprise. These problems may translate into low levels of investment and gradual reduction in the viability of the productive unit. Third, production cooperatives frequently limit hand labor or wage participation by family members of the joint owners. There are few clear inheritance rules, and restrictions on family participation are creating dissatisfaction among joint owners. Finally, lack of incentives and adequate supervision mechanisms mean lower joint labor productivity. Traditional problems of free riders in cooperative arrangements thus emerge.

Organized labor in Cuba has also identified the following problems associated with the UBPC structure: (1) the lack of autonomy in decision-making for the UBPC; (2) the fact that UBPC administrative decisions effectively go beyond just day to day matters, and

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462. Deere Testimony, *supra* note 16, at 5.

463. *Id.* at 6.

464. *Id.*

DISTRIBUTION OF NON-SUGAR CANE UBPCS: JUNE 1995	
Type of Agriculture	Number of Cooperatives
Various Produce	356
Cattle	728
Citric Products and Fruit	110
Apiculture	71
Coffee	204
Tobacco	70
Rice	15
Mixed	2
Forest	2
TOTAL	1558

Díaz, *supra* note 427, at 3.

465. Cuba Project Paper, *supra* note 363, at 2-3.

include, for example, personnel policy; (3) many UBPC decisions are made without any state intervention from government.<sup>466</sup>

Another liberalization in the agriculture sector involves the farmers' markets.<sup>467</sup> In these markets, which had officially existed until 1985,<sup>468</sup> surplus agricultural produce—production above and beyond production quotas—could be sold privately.<sup>469</sup> These markets were reopened in the autumn of 1994.<sup>470</sup> Although undocumented, there is speculation that this policy change is a result of military pressure to address the underlying causes of public unrest in Cuba.<sup>471</sup> Reopening the markets has had the effect of “bleaching the black market”—that is making legal what was previously illegal.<sup>472</sup> Since the change, the value of the Cuban peso rose from 140 pesos to the U.S. dollar (before the change in 1994) to about 40 or 50 pesos to the dollar in early 1995,<sup>473</sup> and 10 pesos to the dollar in early September 1995.<sup>474</sup> It is not clear whether re-opening the markets has actually increased food production; some experts speculate that food production is being diverted from the quota system to the farmers markets.<sup>475</sup> In practice, production quotas that had been imposed on farms were not being met.<sup>476</sup> Nevertheless, more food appeared in May 1995 than had been available twelve or fifteen months earlier.<sup>477</sup> While some have suspected military participation in the production of food, the level of

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466. Martín Romero, *supra* note 447, at 8.

467. See generally Abbassi, *supra* note 426, at 14.

468. The *mercados libres campesinos* (free peasant markets) were eliminated in mid-1986. Sergio G. Roca, *Reflections on Economic Policy in Cuba's Food Program, in CUBA AT A CROSSROADS*, *supra* note 161, at 94-95, 110. In October 1991 the issue of free peasant markets was again presented to the Communist Party. *Id.* At the Fourth Party Congress, the Party rejected the reinstitution of the markets. *Id.*

469. Messina Presentation, *supra* note 11.

470. *Id.* Abbassi, *supra* note 426, at 14.

471. Messina Presentation, *supra* note 11.

472. *Id.* President Castro has noted that the dollar was in circulation even before it was decriminalized because tips were paid in dollars or people received dollars through relatives. Remarks by Cuban President Fidel Castro to the National Assembly of the People's Government, ANPP (radio broadcast, Cuban TV, Tele Rebelde, Havana, Sept. 4, 1995), in BBC Summary of World Broadcasts, Sept. 7, 1995, available in LEXIS, News Library, Bbcwb File [hereinafter *Castro's Remarks*]. The dollar was circulating and “all we did was legalize something that was already taking place.” *Id.*

473. Messina Presentation, *supra* note 11. Since July 1993, the government has authorized the free circulation of the dollar. See Farah, *Cuba*, *supra* note 415, at D1.

474. *Cubans to Discuss New Investment Law*, *supra* note 417.

475. Messina Presentation, *supra* note 11.

476. *Id.*

477. *Id.*

involvement in food production and food markets has not yet been defined or documented.<sup>478</sup>

Another important change in policy has addressed private sector employment.<sup>479</sup> Individuals are now allowed to be self-employed.<sup>480</sup> Appropriate businesses include barber shops, restaurants, bicycle repair shops, and other businesses that cater to the Cuban people, not the tourists.<sup>481</sup> In addition, there is anticipation that joint ventures will be formed in the near future, if they have not already been organized, between the state and foreign capital entities that are dedicated to food production.<sup>482</sup>

In 1995, modifications in Cuba's property law continued, this time in the form of a new Foreign Investment Law<sup>483</sup> that allowed foreign ownership to extend beyond minority participation in a joint venture.<sup>484</sup> It extends to all foreign citizens, even native Cubans who have taken foreign citizenship, including Americans, although the blockade will make participation nearly impossible for those individuals.<sup>485</sup> For the first time in Cuban history, the legislation has also permitted assembly plants to use Cuban labor to attract capital and technology<sup>486</sup> within duty-free trade and industrial zones.<sup>487</sup> This will

478. *Id.*

479. *Id.* Article 45 of the Cuban Constitution states: "El trabajo en la sociedad Socialista es un derecho, un deber y un motivo de honor para cada ciudadano." 1992 CONSTITUTION art. 45. In translation Article 45 reads: "Work in the Socialist society is a right, a duty, and a source of pride for each citizen." *Id.*

480. Messina Presentation, *supra* note 11.

481. *Id.*

482. Article 23 of the Cuban Constitution recognizes property of mixed business ventures. 1992 CONSTITUTION art. 23.

483. Ley Para la Inversión Extranjera (Sept. 5, 1995) (Cuba) [hereinafter Foreign Investment Law] (on file with the Land Tenure Center Library, University of Wisconsin); *Parliament Head Alarcón Issues Warning on Helms-Burton Bill*, in BBC Summary of World Broadcasts, Sept. 8, 1995, available in LEXIS, News Library, Bbcwb File.

484. Davies, *supra* note 3, at 14. The law includes a measure to allow foreign investors to establish fully owned subsidiaries in Cuba without participation in such companies by Cuban state firms. See *Cuban Parliament Passes Controversial Investment Law Changes*, Deutsche Press-Agentur, Sept. 6, 1995, available in LEXIS, News Library, Wires File. Until this legislation, foreign companies could only own up to 49 percent of a Cuban company. *Id.*

485. *Parliament Head Alarcón Issues Warning on Helms-Burton Bill*, *supra* note 483; *Castro's Remarks*, *supra* note 472; *Cuban Parliament Passes Controversial Investment Law Changes*, *supra* note 484.

486. Farah, *Cuba*, *supra* note 415, at D1.

487. Foreign Investment Law arts. 50-53; Maribel Acosta & Julio Acanda, *Radio Outlines Main Points of Foreign Investment Law*, (radio broadcast, Cuban TV, Aug. 31, 1995), in BBC Summary of World Broadcasts, Sept. 5, 1995, available in LEXIS, News Library, Bbcwb File [hereinafter Acosta & Acanda Report].

be similar to the Mexican *maquiladora*<sup>488</sup> model used to manufacture for export.<sup>489</sup> However, strategic businesses, those connected with national security, defense, education, and public health, continue to have restricted ownership.<sup>490</sup> Yet even in these areas, foreign private investment in management systems will be allowed.<sup>491</sup>

Additional provisions of the new investment law will guarantee the right to repatriate profits.<sup>492</sup> Investors will have the freedom to purchase residential, office, or tourist properties.<sup>493</sup> Further, they will be able to sell their interests either to the government or to a third party, provided the investors obtain prior government authorization.<sup>494</sup>

As part of the legislative debate, Deputies Agustín Lage and Fernando Vecino requested that the law expressly prohibit Cubans living in other countries from participating in investments in Cuba.<sup>495</sup> Others argued that trying to exclude Cubans living abroad would be difficult and would aid those who portray Cuba as intolerant.<sup>496</sup> While the final draft allows for all to invest, an executive committee of the Council of Ministers along with a governmental commission still must approve proposals on a case-by-case basis.<sup>497</sup> Further, foreign

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488. A *maquiladora* is typically a manufacturing plant along the U.S.-Mexico border, where foreign materials are sent, manufactured, and then returned to the original market. AMERICAN HERITAGE DICTIONARY 1097 (3rd ed. 1992).

489. *Castro Takes One More Step Toward Capitalism*, *supra* note 3, at 45.

490. Foreign Investment Law art. 10; Davies, *supra* note 3, at 14.

491. Foreign Investment Law art. 10.

492. *Id.* art. 8; *Castro Takes One More Step Toward Capitalism*, *supra* note 3, at 45; Rice, *supra* note 410, at A5.

493. Foreign Investment Law art. 16(2)(a)-(c); Rice, *supra* note 410, at A5; Farah, *Cuba*, *supra* note 415, at D1.

494. Foreign Investment Law art. 6.

495. Douglas Farah, *Socialist Cuba Alters Course to Spur Foreign Investment*, *New Cuban Law Permits Free-Trade Zones*, WASH. POST, Sept. 6, 1995, at A1. Supporters of open investment, even by former Cuban nationals, include Fidel Castro, Alfredo Guevara, Miguel Barnet, Orfilio Pelaez, Lázaro Barredo, Roberto Bobaina, Eusebio Leal, Luis Estruch and Vicente Jimenez. *Castro Says Cuban Émigrés Should Not Be Excluded from New Investment Law*, BBC Summary of World Broadcasts, Sept. 6, 1995, available in LEXIS, News Library, Bbcwb File.

496. *Id.*

497. *Castro Says Cuban Émigrés Should Not Be Excluded from New Investment Law*, *supra* note 495. Authorization has been defined as one coming from either the Executive Committee of the Council of Ministers, or a Government Commission designated by the Council. Foreign Investment Law art. 2(a). According to Article 21(2), an investment must be approved by the Executive Committee if: (a) the transaction is over US\$10 million; (b) the capital is entirely from overseas; (c) the investments in public services including transportation, communication, aqueducts, electricity, or for the building or operation of any other public work; (d) the investment is by a foreign government; (e) the project is

investors are expected to offer foreign exchange, technology, and markets.<sup>498</sup> The new legislation is said to allow flexibility, but will require verification and consultation.<sup>499</sup> Additionally, the Cuban state reserves the right to decide on the approval of any contract.<sup>500</sup>

Employment is perhaps the most complex issue in the legislation.<sup>501</sup> Under the new framework, foreign investors are still banned from directly hiring Cuban nationals in most cases.<sup>502</sup> Instead, employees will have to work through a state-run employment agency that is responsible for allocating workers.<sup>503</sup> While the employer will be charged dollars, the workers will be paid in Cuban pesos.<sup>504</sup> In this sense, the law continues its prior practice of prohibiting direct employment of Cuban citizens, and substituting instead Cuban intermediary companies to employ local workers. Castro stated that the purpose of this policy was to protect Cuban workers from the "anarchy, disorganization and privileges" of free, direct hiring by foreigners.<sup>505</sup>

Still, large foreign investors will be allowed to press for individuals they want in exceptional cases,<sup>506</sup> a loophole that could become much wider than it now appears.<sup>507</sup> Employees who must work for the Cuban intermediaries may be paid a second, under-the-table dollar wage, to top off low official salaries.<sup>508</sup> Earlier drafts of the legislation allowed investors to employ workers directly.<sup>509</sup>

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for mineral exploitation; (f) there is a purchase of state property or real estate; or (g) the transaction involves the armed forces. *Id.* art. 21.

498. *Castro Says Cuban Émigrés Should Not Be Excluded from New Investment Law*, *supra* note 495.

499. *Castro Says Approval of Investments Will Be 'Flexible' but Subject to Scrutiny*, *supra* note 17.

500. Acosta & Acanda Report, *supra* note 487.

501. *Castro Says Approval of Investments Will Be 'Flexible' but Subject to Scrutiny*, *supra* note 17.

502. Foreign Investment Law art. 31(1); *see also Cuban Parliament Passes Controversial Investment Law Changes*, *supra* note 484. Article 31(2) allows employers to hire directly foreign management or technical employees, despite Article 31(1)'s policy preference for hiring Cuban nationals. Foreign Investment Law art. 31(2).

503. Foreign Investment Law art. 33; Davies, *supra* note 3, at 14.

504. Davies, *supra* note 3, at 14.

505. Martin, *supra* note 407, at 8.

506. Farah, *Foreign Investors*, *supra* note 408, at A14. Article 35 allows the governmental authorization to set up "special labor rules." *See* Foreign Investment Law art. 35.

507. *Castro Takes One More Step Toward Capitalism*, *supra* note 3, at 45; de Cordoba, *supra* note 407, at A11.

508. *Castro Takes One More Step Toward Capitalism*, *supra* note 3, at 45; *see also* de Cordoba, *supra* note 407, at A11.

509. de Cordoba, *supra* note 407, at A11.

The new investment legislation now allows foreigners to purchase property, including attractive beachfront lots suitable for condominiums.<sup>510</sup> In theory, investments of \$10 million or less can be approved at a ministerial level within sixty days<sup>511</sup> from the time the respective proposal is submitted to the government for consideration.<sup>512</sup> To provide investors with security to induce investment, the law guarantees appropriate prior compensation in the case of any expropriation.<sup>513</sup> Still, the legislation was approved without the belief that it would result in massive new investment, but rather that it would prevent loss of investment and keep Cuba competitive in terms of investment opportunity.<sup>514</sup> Andrew Zimbalist, a Smith College economist and a Cuba specialist, says investors fear that the Cuban government will treat them according to "political whim."<sup>515</sup> Historically, this has made investors wary about their involvement in Cuba.<sup>516</sup>

### C. Housing

Two basic systems of home ownership coexist in Cuba, outright ownership of housing and long-term leasing.<sup>517</sup>

#### 1. Home Ownership

Article 22 of the 1976 Cuban Constitution and Article 156 of the Civil Code seek to establish the right to home ownership.<sup>518</sup> Since 1959, one million Cubans have become homeowners.<sup>519</sup> Rough estimates show there are about 2.75 million homes in Cuba with about eighty to ninety percent of them privately owned.<sup>520</sup>

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510. Davies, *supra* note 3, at 14.

511. *Id.*

512. Foreign Investment Law art. 21(6); *see also* *Castro Says Approval of Investments Will Be 'Flexible' but Subject to Scrutiny*, *supra* note 17 (citing Ernesto Melendez, the Cuban Foreign Investment and Economic Cooperation Minister).

513. Article 3 of the Foreign Investment Law allows expropriation for "public utility or social interest." Davies, *supra* note 3, at 14; Foreign Investment Law art. 3. Article 3 also requires prior indemnification in freely convertible money at a commercial value of mutual agreement or a value established through an international arbitration arrangement. *Id.*

514. *Castro's Remarks*, *supra* note 472.

515. Rice, *supra* note 410, at A5.

516. *Id.*

517. John P. Rathbone, *Private Property Rights in Cuba (1992): Housing*, LA SOCIEDAD ECONÓMICA DE AMIGOS DEL PAÍS BULLETIN (La Sociedad Economica, London, England), Mar. 17, 1991, at 2 [hereinafter Rathbone, *Housing*].

518. *Id.*

519. *Id.*

520. *Id.*

When addressing home ownership, a distinction should be made between ownership of the house structure itself and ownership of the lot on which the home sits.<sup>521</sup> A homeowner does not necessarily own the lot.<sup>522</sup> At times, the lot may be state-owned.<sup>523</sup> This, however, is a legal technicality. In these cases, the homeowner can purchase a life-long, inheritable right to live on the land, called a *derecho perpetuo de superficie*, a usufructuary interest.<sup>524</sup> The fee is paid on a one-time-only basis.<sup>525</sup> The usufructuary rights remain in effect as long as the land is used for housing.<sup>526</sup>

*a. The 1960 Urban Reform Act*

The Urban Reform Act of October 1960 radically changed the housing market in Cuba. The legislation canceled outright all leases and mortgages on existing properties.<sup>527</sup> Renters and mortgagees were converted into potential owners, and were required to make payments to the state.<sup>528</sup> If they paid punctually, including all real estate taxes (now their responsibility), they became owners after a period of years, depending on the age of the building.<sup>529</sup> These "potential owners" were also responsible for all repairs.<sup>530</sup> Any delinquency in payment meant loss of all rights.<sup>531</sup>

From a legal perspective, the new law introduced the idea of housing as an inalienable, non-rescindable right.<sup>532</sup> Leaseholds were converted from private to public ownership, the State giving usufructuary interests to the occupants, now "owners."<sup>533</sup> In the first phase of

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521. *Id.* at 4.

522. Consuegra-Barquín, *supra* note 109, at 911.

523. *Id.* Consuegra-Barquín actually argues that the state is the sole proprietor of the totality of the Republic's land, with the exception of those lands that belong to small farmers or their cooperatives. *Id.* This would include urban lots. *Id.*

524. Resolución No. 1/87 resolution 1 (Jan. 6, 1987) (G.O., Jan. 21, 1987) (Cuba) [hereinafter Resolución 1/87].

525. Rathbone, *Housing*, *supra* note 517, at 4.

526. *Id.*

527. LAZO, *supra* note 38, at 231.

528. *Id.*

529. *Id.*

530. *Id.*

531. *Id.*

532. Ley de Reforma Urbana whereas cl. 2 and art. 1 (G.O., Oct. 14, 1960) (Cuba) [hereinafter Urban Reform Law]. Urban reforms have precedence in the Latin America region. *See, e.g.*, Decreto Ley No. 3819 (Aug. 27, 1954) (Cuba); Ley de Oct. 29, 1956 (Bol.).

533. Article 9 of the Urban Reform Law sets forth the contract whereby the occupant purchases the house from the Government. Urban Reform Law art. 9. *See also* Ley Gen-

the law, purchasers had financing terms of five to twenty years, depending on the age of the home.<sup>534</sup> The law was later amended to allow for newly constructed homes to be sold off with permanent usufructuary interests, with monthly financing not to exceed ten percent of family income.<sup>535</sup> The third and final stage was to give free usufructuary interests to all families.<sup>536</sup>

All urban rental arrangements were declared illegal,<sup>537</sup> except for vacation hotels, hostels, or non-permanent arrangements for vacations.<sup>538</sup> Mortgages were also outlawed.<sup>539</sup> Property the state handed out could not be traded, transferred or sold without prior authorization from the Counsel of the Urban Reform.<sup>540</sup> The State maintained a right of first refusal in all such cases.<sup>541</sup> Despite research, it could not be determined whether these provisions have been honored in practice.

In a transition from leasehold to freehold, the government first reduced rents by 30 to 50 percent along a gradual scale.<sup>542</sup> Surprisingly, criminal penalties attached for infringement of this civil legislation.<sup>543</sup> As a result of this new legislation, over 200,000 rentals were converted to home ownership.<sup>544</sup>

In practice, the Cuban government was a strict landlord. Attorneys representing former owners seeking compensation or clients about to be evicted were themselves accused of counter-revolutionary activities, an offense that carried the death penalty.<sup>545</sup>

#### *b. The 1984 Housing Law*

By 1984, about half of the 2.5 million Cubans owned their homes.<sup>546</sup> The 1984 legislation sought to extend home ownership to those persons who had lived as usufructuary beneficiaries of govern-

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eral de la Vivienda, Ley No. 65 whereas cl. 2 (G.O., Dec. 23, 1983) (Cuba) [hereinafter 1988 Housing Law].

534. Urban Reform Law art. 1(a)

535. *Id.* art. 1(b).

536. *Id.* art. 1(c).

537. *Id.* art. 2.

538. *Id.* art. 4.

539. *Id.* art. 30.

540. *Id.* art. 29.

541. *Id.*

542. *Id.* art. 37.

543. *Id.* art. 44.

544. Rathbone, *Housing*, *supra* note 517, at 2.

545. LAZO, *supra* note 38, at 231.

546. Rathbone, *Housing*, *supra* note 517, at 2.



ment-constructed housing built since 1960.<sup>547</sup> Legislation affirmed the goal of housing ownership for all occupants currently living in homes.<sup>548</sup> The law also sought to promote construction to address the national housing deficit.<sup>549</sup> The *Instituto Nacional de la Vivienda* (National Housing Institute) was charged with carrying out these goals.<sup>550</sup>

The 1984 legislation allowed 480,000 lessors to amortize their rent payments to purchase homes.<sup>551</sup> Sales prices were calculated at the equivalent of fifteen to twenty years of rent, with rent being no more than ten percent of monthly income.<sup>552</sup> Past rent counted towards the purchase price.<sup>553</sup> For persons wishing to purchase the property outright, personal loans, but not mortgage loans, were available through the *Banco Popular de Ahorro* (People's Savings Bank), the only institutional source for consumer lending in Cuba.<sup>554</sup> Otherwise, occupants simply continued to pay monthly rent until they purchased the house.<sup>555</sup> By 1988, 450,000 families had acquired homes (with 350,000 homes registered to titleholders), while 30,000 home sales remained pending, due to late rent payments.<sup>556</sup>

Since back rent counted toward purchase price, about 740,000 individuals automatically received title to their homes without any additional payment due.<sup>557</sup> This figure represents about one third of Cuban households.<sup>558</sup> Included in this group were persons who built their own homes and beneficiaries of housing projects in rural areas.<sup>559</sup>

Persons who continued to live in tenements, irreparable structures or informal housing were ineligible for registration as homeowners.<sup>560</sup> In these cases, the earlier Urban Reform Law continued to

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547. Ley General de la Vivienda, Ley No. 48 art. 22 (G.O., Dec. 27, 1984) (Cuba) [hereinafter 1984 Housing Law]. People who built homes prior to October 14, 1960 on land belonging to the state, in most cases got the land free of any further charge for the *derecho perpetuo de superficie* (right of usufruct). See also Resolution No. 1/87 resolution 4.

548. 1984 Housing Law art. 1.

549. *Id.* art. 2(ch) and (e).

550. *Id.* art. 3; 1988 Housing Law art. 145.

551. Rathbone, *Housing*, *supra* note 517, at 2.

552. 1984 Housing Law art. 11.

553. Rathbone, *Housing*, *supra* note 517, at 3.

554. 1984 Housing Law art. 9; see also Rathbone, *Housing*, *supra* note 517, at 3.

555. *Id.* arts. 10, 13.

556. Rathbone, *Housing*, *supra* note 517, at 2-3.

557. *Id.* at 3.

558. *Id.*

559. *Id.*

560. *Id.*

apply.<sup>561</sup> These individuals continued to have lifetime, rent-free leasehold interests.<sup>562</sup> When appropriate state-constructed housing became available, these individuals would be given the opportunity to purchase a home under the same conditions as other beneficiaries of the 1984 Housing Law.<sup>563</sup>

Yet another group of individuals occupied 145,000 housing units (about six percent of all Cuban housing), which were either owned by or connected with workplaces, representing about one-third of houses built in postrevolutionary Cuba.<sup>564</sup> These persons received special consideration under the legislation, paying a monthly amortized rental payment calculated at about half of the price of comparable housing on the rental market.<sup>565</sup> The rental occupants would become owners outright after twenty years of rental payment.<sup>566</sup>

Finally, the legislation promoted self-construction of housing. It allowed market rate sale of housing, and market rate rental for extra rooms for up to six months.<sup>567</sup> The rental market for extra rooms was important, since there were about 140,000 homes with at least one extra room according to a 1981 census.<sup>568</sup> Special permission was granted for trading homes and swapping home loans.<sup>569</sup> It seems likely that the general housing scarcity pushed individuals into the rental market.

### c. *The 1988 Housing Law*

The 1988 Housing Law represented a partial reversal of the market orientation of the 1984 legislation.<sup>570</sup> The legislation passed amid

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561. *Id.*

562. *Id.*

563. *Id.*

564. *Id.*

565. *Id.*

566. Articles 74 to 76 of the Housing Law of 1984 discuss *viviendas vinculadas* (connected housing). See 1984 Housing Law arts. 74-76.

567. Articles 94 to 107 of the 1984 Housing Law discuss room rentals. See *id.* arts. 94-107. This concept is carried forward in Article 74 of the 1988 Housing Law. 1988 Housing Law art. 74.

568. Rathbone, *Housing*, *supra* note 517, at 3.

569. 1984 Housing Law art. 68.

570. The fourth *whereas* clause of the 1988 Housing Law states: "[F]ortalecer el control que el Estado debe ejercer sobre las operaciones alvededor de la vivienda, así como a definir la decisiva participación estatal en la solución del problema habitacional en el país." Housing Law of 1988 *whereas* cl. 4. (In translation, this *whereas* clause reads: "To fortify the control that the State should exercise over the operations regarding housing, as well as to define the decisive participation of the state in solving the housing problem in the country.").

public debate on "correction of errors" and "negative tendencies" within Cuba.<sup>571</sup> This debate came out of the Third Party Congress in 1986, after individuals recognized a need to address the gap between the rhetoric of exemplary conduct and the facts of privilege and bureaucratic corruption.<sup>572</sup> Old practices, like complacency and trafficking in personal privileges, were reappearing in Cuba and party discipline was in question.<sup>573</sup> Consequently, Cuban leadership sought to confront these concerns.<sup>574</sup>

While in many ways the 1988 law was a continuation of its forerunner, it introduced greater potential for state intervention in the housing and construction markets.<sup>575</sup> It also cut back on the right to buy and sell housing in the market.<sup>576</sup>

## 2. *Leasehold*

Leaseholders generally live in one of three housing categories: substandard housing, state owned properties, or houses left vacant due to emigration.<sup>577</sup> Individuals in substandard housing live rent free with a lifetime leasehold interest.<sup>578</sup> About ten percent of Cubans live in such housing, representing the most popular form of household leasing.<sup>579</sup>

The second group of renters either is still renting properties that were in the private sector in 1959, but are now state-owned (in which case the renter has a usufructuary interest), or is in state-owned property leased without a purchase option.<sup>580</sup> Tenants with a usufructuary interest simply amortize rental payments until obtaining an equity position.<sup>581</sup> With the 1984 legislation, most usufructuary beneficiaries became outright owners. Therefore, those continuing with a leasehold interest represent a negligible portion of the rental market.<sup>582</sup> Similarly, very few renters occupy state-owned houses without a purchase option, also due to the 1984 legislation.<sup>583</sup> Today, leasehold applies

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571. Rathbone, *Housing*, *supra* note 517, at 3.

572. del Aguila, *supra* note 161, at 22.

573. *Id.*

574. *Id.* at 19, 22-23.

575. *Id.* at 22.

576. Rathbone, *Housing*, *supra* note 517, at 3.

577. *Id.* at 4.

578. *Id.* at 3.

579. *Id.* at 4.

580. *Id.*

581. *Id.*

582. *Id.*

583. *Id.*

mainly to renters in special land use zones, such as areas destined for tourist development.<sup>584</sup>

The final group of renters occupy houses left vacant due to emigration.<sup>585</sup> From 1960 to 1974, 139,256 houses became available for rental in this fashion, almost as many homes as were constructed by the government over that same period.<sup>586</sup> The government has managed these homes under the same criteria it uses for newly built government housing.<sup>587</sup>

Tenants in housing made available because of emigration of their owners could receive title to the home in two ways.<sup>588</sup> Approximately forty percent of homes were confiscated by the government and used for public services like schools.<sup>589</sup> The remaining homes, approximately sixty percent, were leased to economically disadvantaged families.<sup>590</sup> Tenants would then make monthly payments amortized until the house was purchased.<sup>591</sup> Alternatively, if the new tenants themselves left the country, any close relative that lived with the tenant for at least two years prior to the tenants' departure could simply assume the tenants' position and continue paying amortized rental payments.<sup>592</sup> This provision could be extended beyond close relatives to any other person living with the tenant, but then a period of five years of living with the tenant would be required for the new beneficiary, instead of just two.<sup>593</sup>

#### *a. Rental Value*

Article 50 of the 1988 Housing Law established a scale for rent pricing.<sup>594</sup> The calculations consider property location, usable floor space, and depreciation.<sup>595</sup> Rent is capped at twenty percent of income.<sup>596</sup> For low income residents, rent may not exceed ten percent of household income.<sup>597</sup> In slum dwellings called "cuarterias," renters

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584. *Id.*

585. 1988 Housing Law art. 55(b); *see also* Rathbone, *Housing, supra* note 517, at 4.

586. Rathbone, *Housing, supra* note 517, at 4.

587. *Id.*

588. *Id.* at 4-5.

589. *Id.*

590. *Id.*

591. *Id.*

592. *Id.*

593. *Id.*

594. 1988 Housing Law art. 50.

595. *Id.*; *see also* Rathbone, *Housing, supra* note 517, at 5.

596. Rathbone, *Housing, supra* note 517, at 5.

597. 1988 Housing Law art. 50, para 2; *see also* Rathbone, *Housing, supra* note 517, at 5.

have lived rent free since 1967.<sup>598</sup> Actual rental price is fixed by the municipality where the home is located.<sup>599</sup> Rent is paid monthly at the People's Saving Bank.<sup>600</sup>

### *b. Leasehold interests*

Leasehold interests are expansive under Cuban law. Leases are inheritable and may only be ended: (1) by mutual agreement; (2) due to death or emigration without leaving clear heirs; (3) due to unsafe conditions; or (4) if the occupant is an illegal occupant.<sup>601</sup> Illegal occupants are usually squatters and persons who are more than three months behind in rent either on state or private property.<sup>602</sup> In theory, illegal occupants could be evicted, however, few evictions actually occur.<sup>603</sup> Evicted persons have nowhere to go. Thus, more often, the state garnishes up to fifty percent of wages.<sup>604</sup> Thus, there are in fact few evictions. Leased homes can be swapped with other occupants of leased homes, provided proper authorization is given at the municipality.<sup>605</sup>

### *3. Real Estate Market for Housing*

The Cuban housing market is tightly controlled. The state maintains the right of first refusal on all sales.<sup>606</sup> Owners may only sell at a government determined price, a function of the size, location, and quality of the home.<sup>607</sup> Prices range from 45 to 215 pesos per square meter.<sup>608</sup> Values have no relationship to amortized rental prices; often sales prices are much lower.<sup>609</sup>

598. Rathbone, *Housing*, *supra* note 517, at 5.

599. Resolución No. 63/92 art. 5 (Apr. 24, 1992) (G.O., May 6, 1992) (Cuba) [hereinafter Resolución 63/92].

600. *Id.* art. 6.

601. 1988 Housing Law art. 58. These classifications were redefined by executive order. Article 11 of Resolución No. 63/92 allows for rental to conclude in six ways: (1) by mutual agreement, (2) unilateral decision of the renter, (3) by unjustified use of the home for six months, (4) due to change in purpose for the home, (5) due to breach of contract by renter, (6) due to trade of the home to someone else or cession of rights to someone else, and (7) due to public utility. See Resolución No. 63/92 art. 11.

602. See generally 1988 Housing Law arts. 111-15.

603. *Id.* art. 114.

604. Rathbone, *Housing*, *supra* note 517, at 5. This remedy is contemplated in Article 113 of the 1988 Housing Law. See 1988 Housing Law art. 113.

605. Resolución No. 63/92 art. 10.

606. See, e.g., Resolución No. 1/87 resolution 6.

607. Rathbone, *Housing*, *supra* note 517, at 5.

608. *Id.*

609. *Id.* at 5-6.

Due to the low sales prices, there are few formal market sellers. More typical are *permutas* (house exchanges).<sup>610</sup> These exchanges require no governmental or legal authorization.<sup>611</sup> Persons can trade homes and personal debt.<sup>612</sup> Under Cuban law, home or consumer loans are personal rather than asset-based.<sup>613</sup> The exchange of homes allows households to take personal debts with them to the new residence.<sup>614</sup> Moreover, the 1984 legislation allows parties to exchange personal debts, functioning as a substitute for mortgage lending by one party to the other.<sup>615</sup> One party can even end up holding the personal debts from both dwellings.<sup>616</sup>

To get more homes on the market, the government has pledged support for housing construction loans.<sup>617</sup> Special rules on construction seek to further encourage new construction.<sup>618</sup> This strategy complements housing swaps to provide additional housing. House swaps usually involve only two parties, but may involve complicated, multiple exchanges. Indeed about 20,000 swaps take place annually.<sup>619</sup> Classified ads, bus stops, window ads and grocery stores serve as advertising networks.<sup>620</sup>

Finally, a condominium law has given structure to multifamily housing arrangements.<sup>621</sup> This framework allows individuals living in multifamily units to transfer individual interest with total independence from the group.<sup>622</sup> Condominium housing is either self-administered, if it is a smaller piece of property, or administered by the municipality, if there are a large number of individual homes involved.<sup>623</sup> In either case, an Administrative Board oversees the con-

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610. 1984 Housing Law art. 68; 1988 Housing Law art. 68.

611. 1988 Housing Law art. 68. Non-traded homes required certain legal formalities for an exchange, including notarized documents and prior authorization. See 1984 Housing Law art. 70; 1988 Housing Law art. 70.

612. Rathbone, *Housing*, *supra* note 517, at 5-6.

613. *Id.*

614. *Id.*

615. *Id.*

616. *Id.*; 1984 Housing Law art. 68.

617. 1988 Housing Law art. 5; Joint Resolution, *whereas* cl. 1.

618. See generally Resolución No. 160/91 (June 27, 1991) (G.O., July 17, 1991) (Cuba) [hereinafter Resolución No. 160/91].

619. Rathbone, *Housing*, *supra* note 517, at 5.

620. *Id.* at 6.

621. Since the new 1988 Housing Law, new rules were enacted to carry out this policy. See generally Resolución 4/91 (Jan. 14, 1991) (G.O., Jan. 18, 1991) (Cuba) [hereinafter Resolución No. 4/91].

622. *Id.* art. 4.

623. *Id.* arts. 33-35.

dominium.<sup>624</sup> The residents elect a President and a Treasurer by certain democratic procedures.<sup>625</sup>

Because of the 1988 Law, current legislation forbids speculation in the housing market.<sup>626</sup> Consequently, exchanges between large, expensive homes and cheaper, smaller homes are not allowed. Exchanges must be certified by a notary empowered to use discretion about whether a transaction might be suspect.<sup>627</sup> Occasionally, speculative transactions may result in state confiscation of the property.<sup>628</sup>

In the leasehold market, lessees can also trade homes. Leased homes can be swapped with other occupants of leased homes, provided proper authorization is given at the municipality.<sup>629</sup> Unlike the freehold market, exchanges of leases require authorization from the appropriate local housing council.<sup>630</sup>

Finally, leaseholders can exchange property with homeowners under a complex legal arrangement. Title for homeowners remains with the household, not the house itself. So, a leaseholder who trades with an owner remains a leaseholder in the new home. The homeowner, similarly, remains a homeowner but in the new house. While these exchanges made transactions confusing, they have largely been eliminated as a result of the 1984 legislation that made most occupants owners outright.<sup>631</sup>

In practice, there is an active informal land market. According to one account from 1991:

If you wanted to move within [Havana], you simply went to the Del Prado Avenue plaza, Havana's real estate marketplace. Hundreds of people gathered every morning in a tree-covered square in the middle of the wide avenue. Men and women—many of them elderly people—would sit on the colonial benches or walk around holding signs. "Have three bedroom apartment in Vedado. Looking for one bedroom apartment in same area," read a typical one. The minute you inquired about a possible exchange, the seller would say: "I'm open to proposals," code for, "How much are you willing to pay?"

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624. *Id.* art. 36.

625. *Id.* arts. 36-40.

626. 1988 Housing Law final disposition 7.

627. *Id.* arts. 69-72.

628. *Id.* final disposition 7.

629. Resolution No. 63/92 art. 10.

630. *Id.*

631. Rathbone, *Housing*, *supra* note 517, at 6.

Milling around the plaza were illegal real estate agents, carrying thick notebooks under their arms. If you didn't find a sign to satisfy your housing needs, you approached one of the agents, and told him what you were looking for. The man would check his notebook and most likely find your dream house there. The middleman would then arrange a meeting with the potential seller.

If the transaction went through, the realtor would get a five percent commission on the off-the-books purchase price. As far as the government was concerned, the two properties had been traded without one centavo ever changing hands.<sup>632</sup>

### III. Status of Geographic Information: Property Registries

The agrarian reform legislation prescribed that all land not recorded in the property registries before October 10, 1958 would be considered property of the State.<sup>633</sup> That same legislation required the Ministry of Treasury to survey and record all state lands.<sup>634</sup> State lands consist of unregistered properties, properties registered in favor of the state, and purchased and acquired lands.<sup>635</sup> Actions for recovery of state land are imprescriptible; that is, they do not have a respective statute of limitations.<sup>636</sup>

The agrarian reform law also mandated that new regulations be implemented for registration of land grants in a new Rural Property Section of the Property Registry.<sup>637</sup> Until these new regulations were

632. OPPENHEIMER, *supra* note 166, at 140-41.

633. Agrarian Reform Law art. 8.

634. *Id.*

635. *Id.* art. 10.

636. *Id.* transitory provision 1.

637. *Id.*

PROPERTY REGISTRATION PROCESS AT A GENERIC TRADITIONAL REGISTRY IN CENTRAL AMERICA: SAMPLE PROPERTY TRANSFER		
Steps	Usual Time	Comments
1. Presentation	Less than half an hour.	Presentation of a registration request is carried out at the public counter. The request is called a <i>diario</i> . The <i>diarios</i> are usually presented by lawyers or notaries to one of two windows where the receipt of the document is recorded. The receipt book contains columns for owner name, a document number (assigned serially by month), and the volume and page where a copy of the document is actually filed (in the tomes). The time and date are also stamped on the back of the last page of the document. Two copies must be presented for recording, with a copy kept for filing and the original returned to the owner.



2. Microfilming	Microfilming of documents is relatively up-to-date, without any backlog.	Microfilm copies are made and stored on site.
3. Marginalization	A delay of about three months.	Marginalization is a process of making marginal notes, indications of a transaction pending. The delay of about three months creates opportunities for fraud via multiple sales of a single parcel prior to completion of marginalization.
4. Distribution	Little delay.	Distribution of the transaction is made to a working group, which will inscribe the transaction. Working groups are referred to as "cells," or <i>células</i> in Spanish.
5. Confrontation	Usually several days. However, if someone else is using the book(s) needed to carry out the confrontation, the examination is put on hold until the book(s) is/are available. In practice, this means months in some cases.	Confrontation consists of examination of the document against the existing records in the Registry.
6. Qualification	Assuming there is no problem, the document will pass the qualification in about a week. If a problem arises, however, the process bogs down and can carry on for as long as <i>ten years</i> .	Qualification involves a scribe who drafts up the document, which is then approved by a Registrar.
7. Typing	In El Salvador, for example, as of July 1994, there was a several month backlog in this office.	This involves preparation of a summary in the <i>folio real</i> or a note in the <i>folio personal</i> , according to the case. The same persons responsible for preparing the textual notes also receive public inquiries. Consequently, they spend most of their time answering questions rather than processing new documents.
8. Photocopying	This now takes about three days.	This activity is done on site.
9. Completion	Little delay.	a) If a <i>folio real</i> transaction: the documents are microfilmed. This process is up-to-date. The documents are then forwarded to the registry's internal cadastre office.
		b) If a <i>folio personal</i> transaction: the documents are sent straight to the registry's internal cadastre office.

Steven E. Hendrix & Stephen J. Leisz, Land Registration for the Urban Poor in Nicaragua: A Status Report with Recommendations 16-17 (July 1995) (unpublished report on file with the Land Tenure Center Library, University of Wisconsin).

put in place, the existing law governed.<sup>638</sup> Reportedly, Cuba has retained its *folio personal* system of property registration,<sup>639</sup> a system still used in parts of Latin America and the Caribbean.<sup>640</sup> Despite a literature review, it is not clear how much the Cuban *folio real* differs from its neighbors' versions.<sup>641</sup>

### A. Urban Registry

The 1984 housing legislation affirmed a *Registro de la Propiedad de la Vivienda* (Housing Property Registry) under the National Housing Institute.<sup>642</sup> The registry was decentralized, and inscription took place at the municipal level where the house was located.<sup>643</sup>

In 1988, Cuba replaced its former housing registry with a new computerized version, organized in a slightly different fashion. While the former housing registry remains, it is only used as a reference tool, not as the active registry.<sup>644</sup>

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638. *Id.*

639. Telephone Interview with Roberto Estrada, Registrar, Vieja Habana, Apr. 20, 1995.

640. El Salvador, for example, maintains most of its rural records in a *folio personal* system, as do Venezuela, Ecuador, and Bolivia. Hendrix & Leisz, *supra* note 638, at 18. In very simplified terms, the *folio personal* system is indexed by name, as opposed to a *folio real* system (used in Costa Rica, Nicaragua, Guatemala, or San Salvador in El Salvador), which is indexed on a parcel basis. *Id.* Analogies can be drawn in common law jurisdictions between areas using a deeds registry system (like most of the United States and portions of Trinidad and Tobago, Barbados, Guyana, and Belize) as opposed to a parcel-based or Torrens system (like Australia or South Africa; surveyed portions of Trinidad and Tobago, Barbados, Guyana, and Belize). *Id.* The *folio personal* is often a slower, more expensive system. *Id.* The *folio real*, however, is predicated on up-to-date parcel maps. In this context, Cuba's continued use of the *folio personal* system can be viewed as conventional. *Id.*

641. The *folio real* is usually a large book (about 15 by 18 inches) containing about 250 pages per volume. The pages are two-page sets, facing each other. The left page has three major and several minor columns containing information about rights to the property. For example, the inscription (parcel description) is placed in the second of the three major columns. Only one inscription is written for each parcel. The left column contains any annotations such as judgments. The right hand column contains information on cancellations, such as cancellation of a use right. The right hand page also contains three major columns and several minor columns, all related to encumbrances on the parcel. For example, mortgages and liens are noted in the center column. Columns for annotations and cancellations, similar to the left page, are also available for the encumbrances page. All entries are usually handwritten or typewritten.

*Id.*

642. 1984 Housing Law art. 120; 1988 Housing Law art. 120.

643. 1984 Housing Law art. 122; 1988 Housing Law art. 117.

644. Rathbone, *Housing*, *supra* note 517, at 1.

Property registration was initiated in Cuba in 1893.<sup>645</sup> The old Civil Code system outlined a framework for inscribing the owner's name and property.<sup>646</sup> However, the registry slowly fell into disuse after the Revolution.<sup>647</sup> Most transfers were made informally, despite Articles 120 and 123 of the 1984 Housing Law that mandated inscription of all transfers.<sup>648</sup>

Article 116 of the 1988 Housing Law created a new registry designed to record all transfers of housing dating back to the Revolution.<sup>649</sup> Reportedly, there are really only two differences between the new and old registries.<sup>650</sup> First, the new registry reverses the order of name inscription.<sup>651</sup> The current owner is listed first, with prior owners listed afterwards.<sup>652</sup> The old system had an inverse system: the current owner was listed last, the very first owner topped the list.<sup>653</sup> Second, the new registry is computerized, despite local press objections to a registry that could be altered as easily as a computerized one.<sup>654</sup> A fee of twenty pesos is charged for any notes made within the registry system.<sup>655</sup> This is paid through tax seals placed on documents.<sup>656</sup>

### ***B. Rural Registry***

Article 9 of the 1959 Agrarian Reform Law required the Ministry of Agriculture to record any confiscated property.<sup>657</sup> Article 28 required that redistributed land also had to be inscribed.<sup>658</sup> Provision Number 3 of the 1959 Agrarian Reform Law allowed for creation of a new rural property registry by INRA for inscription of all future transactions.<sup>659</sup>

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645. *Id.* at 6.

646. *Id.*

647. *Id.*

648. *Id.*

649. 1988 Housing Law art. 116.

650. Rathbone, *Housing*, *supra* note 517, at 7.

651. *Id.*

652. *Id.*

653. *Id.*

654. *Id.*

655. 1988 Housing Law art. 121.

656. *Id.*

657. Rathbone, *Farmland*, *supra* note 251, at 5.

658. *Id.*

659. *Id.*

The 1963 Agrarian Reform Law did not mention any obligation to record land transactions.<sup>660</sup> Since then, production cooperatives have been formed, state farms have been merged, and private farms sold.<sup>661</sup> Thus, some transactions may have gone unrecorded since 1963. However, Articles 62 and 68 of the 1982 Agricultural Cooperatives Law required that all property transactions involving the formation or liquidation of CPAs should be recorded with the State Statistics Committee.<sup>662</sup> Also, legal owners of land were required in 1990 to inscribe land at the municipal registry.<sup>663</sup> So perhaps it will be possible to recover at least part of data on unrecorded transactions post 1963.

The *Registro de la Tenencia de la Tierra* (Land Tenure Registry) is governed by government resolution.<sup>664</sup> Rural property registries are at the municipal level<sup>665</sup> and are based on registries that have been functioning since prerevolutionary times.<sup>666</sup> The registry divides ownership into the following categories: state ownership, cooperative ownership, private property, non-state property (political, social, and popular groups that may own property), and other entities (any type not falling under a previous heading).<sup>667</sup> In terms of organizational structure, municipal and territorial offices were set up.<sup>668</sup> These offices were under the broader control of the Territorial Judicial Departments. The Central Registry Office remained under the control of its internal Legal Department.<sup>669</sup>

The Central Registry Office receives copies of inscriptions from the field offices and maintains a centralized, up-to-date national registry.<sup>670</sup> It also inspects and supervises local offices to insure proper office operation, among other functions.<sup>671</sup> In short, the registries have local municipal offices that have contact with the public.<sup>672</sup> Ter-

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660. *Id.*

661. *Id.*

662. *Id.*

663. Resolución 288/90 art. 14 (G.O., May 17, 1990) (Cuba) [hereinafter Resolución No. 288/90].

664. Resolución 597 created the Registry, and Resolución 598 set forth its administrative rules. Resolución 288/90 whereas cl. 2 (citing Resoluciones Nos. 597/87, 598/87 (Oct. 27, 1987) (G.O., Nov. 13, 1987) (Cuba) [hereinafter Resoluciones Nos. 597/87, 598/87]).

665. Resolución No. 288/90 art. 6.

666. Rathbone, *Farmland*, *supra* note 251, at 5.

667. Resolución No. 598/87 art. 2; Resolución No. 288/90 art. 2.

668. Resolución No. 598/87 art. 4.

669. *Id.*

670. *Id.* art. 5(a), 6.

671. *Id.* art. 5(c)-(e).

672. *Id.* art. 7.

ritorial offices provide certain analytical and supervisory services,<sup>673</sup> while the Central Registry Office has the broadest level of oversight.<sup>674</sup> The municipal registries are also supervised in administrative matters by the Cooperative and Peasant Director for Municipalities.<sup>675</sup> The territorial offices are under the control of the appropriate Justice Department Delegation, falling under national supervision of the Central Registry Office.<sup>676</sup>

Land is always inscribed at the municipal office where the plot is found.<sup>677</sup> Where property is in more than one municipal jurisdiction, the owner will inscribe the parcel in the municipality of the owner's home. *Id.* This office will then be charged with coordinating the registration with the other appropriate office.<sup>678</sup> Exempt from municipal registration were lands belonging to the armed forces, the Interior Department and local popular power organizations for militias, which would more properly be recorded at the territorial registry.<sup>679</sup>

After an initial review at the municipal registry, requests for registration are sent to the territorial registry office.<sup>680</sup> The territorial office decides upon the merits of the case, and then orders the municipal office to proceed with inscription or not.<sup>681</sup> Backup copies of the inscription are subsequently forwarded by the municipal registry to the territorial one within thirty days.<sup>682</sup>

Data needed for inscription depends on property category. On state farms (farms belonging to the Ministry of Agriculture and Sugar), applications for inscription should contain, among other items, topography, survey, land use, housing, installations, and soil quality, as stated by the Provincial Office of Soils.<sup>683</sup> Private holding applications must include a description of how the property was obtained, together with authorization information, extent of use, survey, and other information.<sup>684</sup> Cooperatives require, among other things, clarification of any improvements, topographic information, and valua-

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673. *Id.* art. 6.

674. *Id.* art. 5.

675. Resolution 288/90 art. 7.

676. *Id.* art. 8.

677. *Id.* art. 12.

678. *Id.*

679. *Id.* art. 13.

680. *Id.* art. 15.

681. *Id.* art. 16.

682. *Id.* art. 18.

683. *Id.* art. 21.

684. *Id.* art. 22.

tion.<sup>685</sup> Private smallholder farmers specifically do not need exact survey information, but can instead rely on sworn declarations for property boundaries.<sup>686</sup> Municipal and territorial offices should make land inspections periodically to insure the accuracy of data and compliance with appropriate norms.<sup>687</sup>

### C. *The National Physical and Fiscal Cadastres*

The *Catastro Nacional de Cuba* (National Cadastre) is organized by the *Dirección de Hidrografía y Geodesia* (Hydrography and Geodesy Office) under the military (*Ministerio de Fuerzas Armadas Revolucionarias*) (MINFAR). GEOCUBA, a corporate entity, is in charge of implementation of the cadastre. The cadastre falls under the jurisdiction of the *Instituto Cubano de Geodesia y Cartografía* (Cuban Institute of Geodesy and Cartography).<sup>688</sup> The cadastre is maintained via a system of municipal offices. Property occupants are expected to come to the office to update parcel information. Parcel measurement is carried out by the government, not the parties, giving a perceived higher accuracy level.<sup>689</sup> To date, the majority of the cadastre has been manually updated.<sup>690</sup>

The National Cuban Cadastre was present in 1992 in 161 municipalities. The cadastre reflects both graphic and verbal descriptions of property and occupants, whether or not legal or formal owners. The cadastral system was heavily influenced by the system previously in Czechoslovakia, which the Cubans felt was one of the most advanced in the world, having survived 300 years of governmental changes and dating back to the Austro-Hungarian Empire.<sup>691</sup>

Maps of 1:10,000 scale exist for 93% of the rural areas, with 7% of rural areas mapped at a 1:25,000 scale, generally corresponding to areas with very low parcel density.<sup>692</sup> All rural areas have been classified as either agricultural, or as one of eight classes of nonagricultural

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685. *Id.* art. 23.

686. *Id.* art. 24(c).

687. *Id.* art. 38.

688. Resolution 598/87 art. 9.

689. See Dirección de Hidrografía y Geodesia, Gobierno de Cuba, *Reformas a Introducir en el Catastro Nacional de Cuba en Interés de los Fines Fiscales, Económicos y Jurídicos*, Seminar on Reforms to the Cadastral and Registry Systems for the Real Estate in the Countries of Central and Eastern Europe and Latin America (Seville, Spain, Mar. 5-8, 1996) at 2 [hereinafter Seville Seminar].

690. *Id.* at 6.

691. *Id.* at 1.

692. *Id.* at 2.

land. Agricultural lands have fourteen subclassifications for sugar cane, citrus, coffee, cacao, tobacco, and other products.<sup>693</sup>

Experimental maps are used for select urban areas such as all of Veradero and parts of Havana. These maps have not been carried out further due to scarcity of resources, and what does exist accounts for only about one percent of urban surface area.<sup>694</sup> For those municipalities that have a cadastre,<sup>695</sup> rural property inscriptions are required to include a Cadastral Certificate.<sup>696</sup>

Cadastral information has had primarily three uses: (1) furnishing calculations of land use area, (2) providing a base for cadastral certificates, required for the inscription of rural property in the public registry, and (3) keeping statistical analysis.<sup>697</sup> However, a working group is being organized to extend the uses of the cadastre to other fields, including tax purposes. Recently, MINFAR, the Justice Ministry, the Agriculture and Sugar Ministries, the Banco Nacional de Cuba (Central Bank), the *Oficina Nacional de Estadísticas* (National Statistics Office), GEOCUBA, and the Institutes for Physical Planning and Housing have joined together to form a working group to explore fiscal application of the national cadastre. The Cuban government believes that the system will provide easy access to necessary data, while deterring tax evasion. The present system, which allegedly provides for precise parcel description and location with georeferenced coordinates, would provide a base for future valuation of property.<sup>698</sup> Other potential future applications for present cadastral data include, among other uses, support for the public registry, banking, agricultural planning, national park management, traffic control, and social services planning.<sup>699</sup>

A literature review has disclosed no serious academic documents concerning the current state of physical cadastral systems or fiscal cadastral records. As a result, any statement here concerning accuracy, format or compatibility would be speculation.

In 1990, the *Centro de Investigaciones de Geodesia, Cartografía y Teledetección* (Center for Geodesic, Cartographic and Remote Sensing Research) established a general conceptualization for geographic

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693. *Id.*

694. *Id.* at 1-2.

695. Resolution No. 598/87 art. 9.

696. *Id.*

697. Seville Seminar, *supra* note 689, at 2.

698. *Id.* at 3.

699. *Id.* at 4.

information in Cuba.<sup>700</sup> This included a land use and land tenure inventory for urban properties, along with a structure for regional and national mapping activities.<sup>701</sup> However, little has been done to carry out this work. According to one report, this activity includes base maps of 1:20,000 scale for the Havana Province, and base maps of 1:250,000 scale at the national level that exist in a DXF format.<sup>702</sup>

In summary, Cuba's property registration system (*folio real*) is a typical, if not dated, system from the region. The system is locally-based, with regional oversight offices. Although the law mandates a cadastre, there is no report of its current status. To the extent property records will be needed to address any conflict with the United States, Cuba's land administration practices will need much more attention in the immediate future.

#### IV. Property Disputes with the United States

U.S.-Cuba relations have been tumultuous. The United States took its first steps toward an embargo in 1960.<sup>703</sup> In May of that year, the United States ordered U.S. oil companies in Cuba to refuse to refine Soviet crude oil because of concern the island might be leaning toward socialism.<sup>704</sup> Castro then nationalized the refineries.<sup>705</sup> On July 6, 1960, Eisenhower canceled the 700,000 tons of sugar remaining in Cuba's 1960 quota under the Sugar Act of 1948, de facto creating an embargo.<sup>706</sup>

Ralph Galliano, writing for the Washington Times, described the situation as follows:

From May 17, 1959, through October 14, 1960, the Castro government expropriated massive amounts of private properties - including those of U.S. citizens - without [acceptable] compensation.<sup>707</sup>

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700. Julio Cabrera Quiñones, Bases Cartográficas digitales planimétricas 1:20,000 de la Provincia Ciudad de La Habana [paper presented at seminar on Urban Land Markets and Information Systems in Latin America and the Caribbean] Havana, Cuba, (Nov. 27-Dec. 3, 1994) at 2.

701. *Id.* at 2-3.

702. *Id.* at 4-5.

703. Bell, *supra* note 7, at 81.

704. *Id.*

705. *Id.* These included refineries from Texaco, Shell, and Esso. See DUMONT, *supra* note 237, at 34.

706. *President Sets Cuba Sugar Quota at Zero for First Quarter of 1961*, 44 DEP'T ST. BULL. 18 (1961); Bell, *supra* note 7, at 81.

707. What is adequate compensation? There has been a great deal of debate on this issue. See, e.g., Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474 (1991).



As authorized by the Foreign Assistance Act of 1961, President Kennedy proclaimed an embargo on trade with Cuba [in February] 1962.<sup>708</sup> The Act also provided for the president to request an evaluation of expropriated U.S. properties. Enabling legislation prompted by the Cuba Claims Association of Miami, headed by Mr. Clarence Moore, led directly to the *ex parte* adjudication of Cuba claims by the U.S. Foreign Claims Settlement Commission. That process was completed in 1972, after three extensions. The commission to the Secretary of State certified that process in the amount of \$1.8 billion. Records show there were a total of 8,816 were claims filed; 1,195 were denied, 1,710 were dismissed, and 5,911 were awarded. While about \$1.8 billion was awarded . . . \$1.5 billion was denied. Of the 5,911 claims awarded . . . 898 were corporate, amounting to \$1.578 billion and 5,013 were for individuals, amounting to \$221 million.<sup>709</sup>

What also makes U.S.-Cuba claims noteworthy is that the \$1.8 billion in claims "constitutes the largest certified seizure of U.S. property by a foreign government in history."<sup>710</sup>

The United States has also restricted travel to Cuba since 1963.<sup>711</sup> It has been noted that: "In 1992, those restrictions were increased under the Cuban Democracy Act (also known as the Torricelli Law), which prohibited trade with Cuba by foreign subsidiaries of U.S. corporations. Previously, these subsidiaries could be licensed by the U.S. government to engage in such trade."<sup>712</sup> Ambassador Alexander Wat-

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708. See Foreign Assistance Act § 620(a), 75 Stat. 424, 444-45 (1962). In 1992, several countries reported unwanted U.S. pressure on them to cease trading with Cuba. See Cameron, *supra* note 171, at 481, 482. That same year in November, the United Nations General Assembly voted 59-3 with 79 abstentions in favor of a resolution calling on the United States to end its embargo of Cuba. *Id.*

709. Ralph Galliano, *Ignoring U.S.-Cuba Claims?*, WASH. TIMES, July 6, 1993 at E4.

710. *Id.*

711. See Lisa Shuchman, *U.S. Won't Ease Embargo Against Cuba, Official Says*, PALM BEACH POST, Apr. 29, 1994, at 5B, available in LEXIS, News Library, Pbpst File. New rules continue to emerge. See, e.g., 60 Fed. Reg. 39,255 (1995) (to be codified at 31 C.F.R. § 515).

712. Shuchman, *supra* note 711, at B5. See Jefferies, *supra* note 1, at 76 (citing Cuban Democracy Act of 1992 §§ 1791-1712, 22 U.S.C. §§ 5001-6010 (1993)); Bell, *supra* note 7, at 77.

There are some questions about the validity of the legislation from the vantage of its extraterritorial application. See Jefferies, *supra* note 1, at 97-99 (1993). Canada passed legislation to retaliate against the United States if any Canadian companies were affected. See Bell, *supra* note 7, at 95.

Curiously, while the United States seeks to extend territoriality to protect U.S. investors, it is narrowly defining territoriality in human rights cases involving Cuba. In one human rights case involving Cuba, Judge Birch of the Eleventh Circuit Court of Appeals held that Cuban and Haitian migrants in a safe haven outside the physical borders of the

son, U.S. Representative to the United Nations, asserted: "The government of Cuba, in violation of international law, expropriated billions of dollars' worth of private property belonging to U.S. individuals and has refused to make reasonable restitution."<sup>713</sup> Similarly, Dennis Hays, Coordinator for Cuban Affairs in the U.S. State Department, reportedly has stated that "before the United States lifts the embargo, the expropriation of American-owned property by the Cuban government would have to be addressed."<sup>714</sup>

Further, Representatives Robert Torricelli and Robert Menendez, both Democrats from New Jersey, "have denounced unnamed corporations doing business with Cuba by acquiring assets Cuba expropriated from U.S. owners. 'To those who seek to profit from stolen properties, our message is clear: you will not be allowed into the United States,' stated Menendez."<sup>715</sup>

More recently, the Cuban Liberty and Democratic Solidarity Act of 1995<sup>716</sup> proposed to:

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United States did not have cognizable U.S. statutory or constitutional rights. *Cuban American Bar Association, Inc., Cuban Legal Alliance, Inc. v. Christopher*, 43 F.3d 1412, 1426 (11th Cir. 1995). The court also held that humanitarian organizations did not have a U.S. First Amendment right to associate with the migrants held in the safe haven outside physical borders of United States for the purpose of engaging in political speech. *Id.* at 1429. Finally, the court held that the government was not required to disclose to humanitarian organizations the names of all Haitian migrants in the safehaven. *Id.* at 1430.

The *Cuban American Bar* case brings up the question of priority in foreign policy. Given that the top 15 U.S. claimants correspond to over two-thirds of all U.S. claims against Cuba and given the reluctance to extend U.S. constitutional protections to persons held at Guantanamo Bay in Cuba, is U.S. foreign policy really intended to protect large U.S. investors but not indigent refugees fleeing oppressive governments? This appears the result under present law. Harold Hongju Koh, *Democracy and Human Rights in the United States Foreign Policy?: Lessons from the Haitian Crisis*, 48 SMU L. REV. 189 (1994); see also Shuchman, *supra* note 711, at B5.

713. Ralph J. Galliano, *More Than a 'Foreign Policy Option'*, WASH. TIMES, Mar. 7, 1993, at B5.

714. Shuchman, *supra* note 711, at 5B. Mike McCurry, formerly of the U.S. Department of State, has indicated: "Our long-standing position is that Americans are entitled to unconditional compensation for their expropriated properties. If the Cubans have a serious proposal in that regard, we would be interested to hear it." See State Department Regular Briefing: Mike McCurry, Federal News Service, June 16, 1993, available in LEXIS, News Library, Fednew File.

715. Jorge A. Banales, *New Measures Against Cuba Proposed*, UPI, Feb. 9, 1995, available in LEXIS, News Library, UPI File.

716. Similar versions were passed by the House and Senate on September 21 and October 19, 1995 respectively. Bryan T. Johnson, *The Cuba Bill: Protecting the Property Rights of Americans*, BACKGROUNDER (Heritage Foundation Repts. No. 441), Dec. 7, 1995, at 1, available in LEXIS, News Library, Hfrpts File.

[A]llow U.S. citizens whose property was confiscated by Fidel Castro to seek compensation in U.S. courts from foreign businesses that now operate on this property. To avoid a threatened Democratic filibuster, the Act's Senate sponsor, Foreign Relations Committee Chairman Jesse Helms (R-NC), agreed to remove Title III, which enabled U.S. citizens to use U.S. courts to seek compensation for their confiscated properties.<sup>717</sup>

The bill was sent to conference to reconcile differences between the Senate and the much tougher House bill [HR 927].<sup>718</sup>

With the downing of two American civilian planes off the coast of Cuba on February 24, 1996, the bill received renewed support.<sup>719</sup> Shortly thereafter, the bill was signed into law and is known as the Helms-Burton Act.<sup>720</sup>

There are three main titles in the Cuba bill.<sup>721</sup>

Title I: strengthens international sanctions against the Castro regime by urging the President to seek an international embargo in the United Nations Security Council. In addition, this title prohibits indirect financing of Castro by U.S. citizens through loans or lines of credit for business ventures using confiscated U.S. property. It also requires the President to oppose Cuban membership in such international financial institutions as the World Bank and the International Monetary Fund until a transitional government is established with a system in place to hold democratic elections.

717. *Id.*

718. *Canada Urged to Use Legislation to Fight U.S. Bill on Cuba*, 12 Int'l Trade Rep. (BNA) 1957 (Nov. 29, 1995), available in LEXIS, News Library, Intrad File.

719. *Cuba the Outlaw*, ECONOMIST, Mar. 2, 1996, at 20.

720. Ann Devroy, *Clinton Adds to Pressure on Cuba: Legislation is Signed to Discourage Foreign Investment on the Island*, WASH. POST, Mar. 13, 1996, at A4.

721. This summary of the bill is from Johnson, *supra* note 717, at 1. According to Johnson:

To get a property claim to court under this bill, a claimant must meet a number of stringent conditions: 1) the claimant must be a U.S. citizen; 2) the disputed claim must be valued at over \$50,000; 3) a foreign investor must occupy the disputed property after the bill is enacted (thus, the bill is not retroactive); 4) a foreign investor must be given 180 days to vacate the disputed property; and 5) a foreign investor laying claim to U.S. property must hold assets within the continental U.S. before he can be sued in a U.S. court. Only after all of these conditions are met may a U.S. claimant seek action in U.S. courts. Under these strict conditions, most of the 6000 claims will not be brought to court.

Johnson, *supra* note 717, at 1. For a good summary of the Act and its proponents' justifications, prepared by the Republican Staff of the Senate Committee on Foreign Relations, see Don Nickles, *Democratic Solidarity (LIBERTAD) Act*, Congressional Press Release, Sept. 21, 1995, available in LEXIS, News Library, Hillpr File.

Title II: specifically instructs the President to develop a strategy to support Cuba's transition to a democratically elected government.

Title III: seeks to protect the interests of U.S. citizens whose property was seized by the Castro regime without due compensation. U.S. citizens could seek restitution from potential foreign investors through the U.S. legal system.<sup>722</sup>

The law allows the President to suspend for six month periods the Title III provision against property.<sup>723</sup> However, the first suspension period was set for August 1, 1996, the middle of the 1996 Presidential campaign.<sup>724</sup> This is a rolling six-month waiver that can only be used if the President finds that suspension of the provision is in the national interest.<sup>725</sup>

Under the new legislation, the embargo will remain in place until "democracy" arrives in Cuba.<sup>726</sup> Democracy is defined specifically to exclude any government that includes Fidel Castro or Raul Castro.<sup>727</sup> Current licensing practices are continued.<sup>728</sup> In addition, the civil penalty process is carried forward under the Helms-Burton Act.<sup>729</sup>

Curiously, the legislation appears designed only to help former large estate holders and not the bulk of Cuban-American claimants.<sup>730</sup> Former property must have a minimum value of \$50,000 exclusive of interest for a claim to inure.<sup>731</sup> Thus, only the wealthiest of Cuban-

722. Johnson, *supra* note 717, at 1.

723. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (Mar. 12, 1996) (codified at 22 U.S.C. §§ 6022 et seq. (1996)).

724. William Scally, *U.S. Senate Approves Cuba Sanctions Bill*, Reuters, Mar. 5, 1996, available in LEXIS, News Library, Reuwlid File. The bill became law on August 1, 1996.

725. 22 U.S.C. § 6064(e).

726. 22 U.S.C. § 6065(a).

727. 22 U.S.C. § 6065(a)(7).

728. 22 U.S.C. § 6082(a)(7).

729. 22 U.S.C. § 6082(a). Many attorneys complain that this hearing process is extremely slow and expensive for litigants and the government. To the extent this process is now embodied in law, the Helms-Burton Act could be criticized as wasteful. Further, the new legislation provided no new funding for the Office of Foreign Assets Control, the U.S. Treasury Department in charge of enforcing embargo provisions. Attorneys also complain the provisions of the law are vague. Assuming most U.S. corporations are excellent in their compliance with law generally and sanctions in particular, we should expect in-house attorneys to construe the statute conservatively. This will further restrict even lawful activity. Yet another problem with the legislation is that it mandates compensation to the families of the pilots shot down off the Cuban coast. To date, there has been no trial or finding of fact by any court. In the future, however, legislation could be criticized as a violation of the rule of law.

730. Louis F. Desloge, *The Great Cuban Embargo Scam: A Little-Known Loophole Will Allow the Richest Exiles to Cash In*, WASH. POST, Mar. 3, 1996, at 1.

731. *Id.*

Americans will benefit. Yet another loophole allows for settlement outside court without need for U.S. government approval.<sup>732</sup> As a result, if a former landowner wants to sue a British company, for example, for trafficking in property in Cuba, the former landowner can reach a settlement agreement whereby the former owner can share in the profits of the new venture in Cuba. In this way, the former owner in fact becomes a de facto and legal U.S. investor in Cuba, without the need for approval from the U.S. government and despite the embargo.<sup>733</sup>

While helping the wealthiest Cuban-Americans and denying recourse to others, the new legislation also has produced two curious results.<sup>734</sup> First, the law applies only to commercial property, and excludes residential property, further excluding small U.S. claimants. Second, it advances an internationalization of American citizenship. In some cases, it has been alleged that third country nationals have incorporated legal entities in Florida, and transferred ownership of "their" property in Cuba to the Florida entity. The Florida company is then treated as a U.S. citizen for purposes of the legislation. In effect, the legislation has been used to extend protection to sophisticated, third country nationals. U.S. courts are now faced with resolving conflicts of non-citizens that occurred in Cuba about thirty years ago.<sup>735</sup>

Even as the bill was being discussed, the Canadian government began consideration of retaliatory measures using the Foreign Extra-territorial Measures Act to block application of U.S. congressional measures that would affect Canada's trade with Cuba.<sup>736</sup> According to Bill Graham, a member of the House of Commons with the governing Liberal Party in Canada:

The United States has the right to embargo trade with Cuba by U.S. firms based on domestic political considerations . . . . But the Canadian government, however, must move to ensure that any measures adopted by Congress that violate international law or U.S. international trade obligations are not used to restrict Canada's rights to conduct relations with Cuba.<sup>737</sup>

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732. *Id.*

733. *Id.*

734. Robert Muse, Address at the Bar of Washington D.C.'s Forum on Cuba (Mar. 21, 1996).

735. *Id.*

736. *Canada Urged to Use Legislation to Fight U.S. Bill on Cuba*, *supra* note 718.

737. *Id.*

He added that:

Canadian legislators have a number of concerns about the original bills, introduced by Senator Jesse Helms, Republican from North Carolina, and Representative Dan Burton, Republican from Indiana, such as the confiscation prohibition, which is particularly troublesome as the bill defines a U.S. person in terms that could apply to subsidiaries in Canada.<sup>738</sup>

According to Graham, "this represents a form of secondary boycott, a practice the United States has in past condemned, for example in the case of the Arab boycott of Israel." Graham has stated that the new law represents "an extraterritorial application of laws against Canadian corporations carrying on lawful business in this country and with Cuba."<sup>739</sup> The enactment of the bill into law prompted scores of condemnations of the United States from countries around the world.<sup>740</sup>

Mario Diaz Cruz Jr., a Cuban lawyer, and David Willig, a Miami-based attorney, are drafting "property-claims legislation for a free-market Cuba. Several property-claims laws are in the works that use restitution and compensation laws from Germany, Hungary, Czechoslovakia, Nicaragua and Mexico as models."<sup>741</sup>

The drafting of new property-claims laws for Cuba has received much of the attention so far. Without the political and economic stability created by a legal framework to return land, homes and businesses to their former owners, and to award money damages and resolve disputes, international investors might balk at pouring money into the island nation. 'Central to the legitimacy of any return to a market-based democracy [in Cuba] and to the confidence of capital markets is the government's recognition that owners

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738. *Id.*

739. *Id.* According to the New York Times, administration officials say the provision would violate international law, create numerous lawsuits, sour relations between Washington and any post-Castro Government, and make it difficult for a post-Castro Cuba to privatize property because of pending lawsuits. Steven Greenhouse, *Bill to Ease Cuba Suits Faces a Veto By Clinton*, N.Y. TIMES, Aug. 20, 1995, § 1, at 4.

740. The 14 Caribbean countries and the Rio Group of 14 Latin American countries both denounced the legislation. See *The Americas: Falling out with Uncle Sam*, ECONOMIST, Mar. 16, 1996, at 47-48. Europe, Japan, and Canada, among others, also objected. See Anne Swardson, *Allies Irked by Bill to Deter Their Trade with U.S. Foes*, WASH. POST, Mar. 7, 1996, at A20.

741. Resnick, *supra* note 4, at 1.

whose property was confiscated 30 years ago have legal rights to their property,' writes Robert E. Freer, Jr.<sup>742</sup>

The Cuban American National Foundation (CANF) has promulgated a number of recommendations for post-Castro economic legislation. These include repeal of all laws, regulations and decrees creating a state-run economy, rapid privatization of most state-controlled assets, and recognition of the right of Cuban citizens, residents, and legal entities to own private property.<sup>743</sup>

CANF leader and Miami millionaire Jorge Mas Canosa has called for a compensation system based on privatization.<sup>744</sup> The National Association of Ranchers and National Association of Land-owners in Exile have claimed that "[n]obody has more right to property than its legitimate owners," providing the example of Nicaragua, which has allowed return of properties to the original owners.<sup>745</sup> As early as August 1990, a joint venture between former Dade County Commissioner Barry Schreiber and the University of Miami Research Institute for Cuban Studies began a private Registry of Expropriated Properties in Cuba, encouraging Cuban exiles to register their claims.<sup>746</sup>

Jeb Bush, the son of former President George Bush and the Chairman of the International Republican Institute (IRI), has taken a slightly different stance than CANF.<sup>747</sup> Bush urges a rapid effort to define the parameters of restitution.<sup>748</sup> He stops short of calling for full, adequate, and effective compensation for expropriated properties.<sup>749</sup> Instead, Bush emphasizes acceptance of responsibility to make restitution in a form to be determined by future negotiations.<sup>750</sup>

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742. *Id.* (quoting Robert E. Freer, Jr.). Freer is a partner at Freer & Alagia in Washington, D.C. and a member of the Cuban American National Foundation's Blue Ribbon Committee on the Reconstruction of Cuba. *Id.* The quotation comes from a paper published in May 1993. *Id.*

743. *Id.* According to Resnick, the Cuban American National Association is a powerful Washington, D.C., lobbying group with close ties to the Republican Party and an anti-Communist orientation. *Id.*

744. OPPENHEIMER, *supra* note 166, at 323. In mid-1991, Mas Canosa released his "Social, Political and Economic Program for the Reconstruction of Cuba." *Id.* According to Oppenheimer, Mas Canosa is perceived as the "head of a horde of rich exiles eager to reclaim their lost properties." *Id.* at 328.

745. *Id.* at 324.

746. *Id.* at 323.

747. INTERNATIONAL REPUBLICAN INSTITUTE, *supra* note 3, at 26.

748. *Id.*

749. *Id.*

750. *Id.*

Alternatively, Michael Krinsky, a lawyer representing Cuban interests in the United States, asserts: "In most other countries the United States has ultimately reached a settlement not for the return of the property but for a part of the lump sum. On the average that was about 40 percent of the claim value without interest."<sup>751</sup>

Part of the problem in dispute resolution, compensation, or restitution is deciding which law applies: the prerevolutionary, revolutionary, or postrevolutionary law. In Cuba, some scholars argue that the 1940 Constitution remained in effect during the Castro years. They claim the new government was never legally constituted under the provisions of that 1940 document; consequently, all subsequent actions are violations, and prerevolutionary law should apply.<sup>752</sup> Some takings may have violated even revolutionary law norms.<sup>753</sup> These same scholars advocate that future law could clarify the current ambiguity and restore rights from the past.<sup>754</sup>

## V. Property Disputes with Other Countries

"Cubans also cite the embargo as the reason it has been impossible to negotiate indemnification agreements with . . . the U.S. property seized during the revolution."<sup>755</sup> In comparison, Cuban officials assert that "all other countries with property claims have been indem-

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751. Ana Arana, *U.S. firms making Cuban land claims*, SUN-SENTINEL, May 16, 1993, at 1F, available in LEXIS, News Library Sungen File.

752. Jon L. Mills, *Principal Issues in Confiscated Real Property in Post-Communist Cuba*, in CUBA IN TRANSITION: OPTIONS FOR ADDRESSING THE CHALLENGE OF EXPROPRIATED PROPERTIES 23-25 THE CENTER FOR PUBLIC RESPONSIBILITY, UNIV. FLORIDA COLLEGE OF LAW & A.B.A. SEC. OF INT'L L. & PRAC. Perhaps the most direct argument against the constitutionality of the Castro government is found in Gutiérrez, *supra* note 119, at 2. These necessary arguments are based on the unconstitutionality of the takeover by Castro and the implicit reforms to the 1940 Constitution through the Organic Law of 1959, which were without following procedures set out in the 1940 Constitution itself. It should be noted, however, that the status of the 1940 Constitution itself was in question even before Castro assumed power. Batista had usurped power himself in 1952 in an unconstitutional manner, leaving some doubt as to the exact status of the 1940 document by the time Castro had taken over. For his part, Castro's speeches seem to indicate that he at least thought of the 1940 Constitution as governing, as he cited its provisions against largeholder estates, and carried these provisions over to the new Organic Law.

753. This occurred in Nicaragua. See *Nicaragua Property Disputes*, WORKING PAPER SERIES (The Carter Center, Emory Univ., Atlanta, Ga.), Apr. 1995, at 8-12 (report prepared for the United Nations Development Program by the Latin American and Caribbean Program) (on file with author).

754. Mills, *supra* note 752, at 23, 25.

755. *Hearings before the Subcomm. on Select Revenue Measures and the Subcommittee on Trade House Comm. on Ways and Means*, 103rd Cong. 2nd Sess. 314 (1994) (testimony of Irene Philippi, Senior Economist, Polyconomics, Inc.) [hereinafter *Philippi Testimony*].



nified."<sup>756</sup> Cuba has already settled with Switzerland, France, Canada, Great Britain, Italy, and Spain, claims totaling about \$60 million.<sup>757</sup>

"No other country applies economic sanctions against Cuba,"<sup>758</sup> and in 1995 the U.N. General Assembly for the third consecutive year condemned the U.S. embargo.<sup>759</sup> "Almost every government in the

756. *Id.*

757. Olga Miranda, *Cuba Ha Satisfecho con Puntualidad sus Obligaciones de Pago por Nacionalizaciones*, in Cuba Transition Workshop, *supra* note 119, at 32, 36. In general, these claims have been settled at a fraction of the assessed value of the expropriated assets. Travieso-Díaz, *supra* note 24, at 220 (citing *Cuba to Compensate Spaniards for Property Seizures*, Reuters, Feb. 15, 1994). The Spanish claims, for example, were valued at \$350 million. The settlement paid \$37.6 million. *Id.* "Even this amount was not actually paid until 1994, three decades after the claims accrued." *Id.*

758. Banales, *supra* note 715. The Organization of American States lifted the mandatory sanctions on Cuba in 1975. See Boris Yopo H., *Latin American Perspectives on the Cuban Transition*, 3 CUBA BRIEFING PAPER SERIES 1 (1993).

759. *General Assembly Adopts Draft on Need to End United States Embargo Against Cuba*, Federal News Service, Nov. 3, 1995, available in LEXIS, News Library, Fednew File; *Foreign minister comments on UN Resolution Condemning US Embargo*, BBC Summary of World Broadcasts, Nov. 3, 1995, available in LEXIS, Top News Library, Bbcwb File; Banales, *supra* note 715.

One example of the drastic extraterritorial effects of the embargo occurred in May 1991. Regor International, a Canadian corporation, incorporated and doing business in Canada, ordered 29,000 cases of Pepsi from Pepsi Cola Montreal. Pepsi, however, canceled this order when it learned that the product's final destination was Cuba. Pepsi-Cola Montreal claimed that due to discussions between its Canadian office and the U.S. head office, it was unable to fill any orders where the product was destined for Cuba. The drastic effect on companies incorporated in Canada and subject to Canadian laws stems from the fact that Canadian foreign policy towards Cuba favors trade in non-strategic goods. In response to this situation, the Canadian Trade Ministry issued a reprimand which stated that the Canadian government has . . . consistently opposed the extraterritorial application of U.S. trade policy towards Cuba, either directly by the U.S. government or through U.S. parent corporations.

Bourque, *supra* note 149, at 213-14. Bourque also notes that:

Many countries, such as Great Britain, view the (Mack) Amendment and the policies supporting it, as a violation of their sovereign rights. As evidence of its opposition, in 1980 Great Britain passed into law The Protection of Trading Interests Act (PTIA). The PTIA is a response to what many consider to be U.S. extraterritorial measures. This Act instructs British companies to ignore American laws, such as the Mack Amendment, that affect foreign sovereignty.

*Id.* at 217-18. Bourque goes on to assert that:

[T]he European Community also protested the Cuban Democracy Act by stating: the European Community and its Member States cannot accept the extraterritorial extension of U.S. jurisdiction as a matter of law and policy . . . . The Bill . . . would also prohibit any vessel from engaging in trade with the United States if the vessel has entered a port in Cuba during the preceding 180 days. Such a measure would be in conflict with long-standing rules on comity and international law . . . .

*Id.* at 220 (citing Mary Murray, CRUEL AND UNUSUAL PUNISHMENT: THE U.S. BLOCKADE AGAINST CUBA 21 (1993).

Western Hemisphere maintains diplomatic and economic relations with Cuba," among these are "Canada and Mexico, members of the

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Arguably, the criticism directed against the United States is well-deserved. The Torricelli Bill's imposition of sanctions onto third countries violates international law and encourages the economic isolation of Cuba. In addition, this policy clearly imposes U.S. domestic law onto sovereign states by making foreign investors and businessmen suffer should they choose to engage in business relations with Cuba. The Bill, therefore, removes the element of free choice from business decisions of companies outside of U.S. territory.

*Id.* at 220-21.

In March 1974, MLW-Worthington, a Canadian firm, negotiated a contract with Cuba for approximately \$15 million. Bell, *supra* note 7, at 86. The Canadian government and the Canadian directors of MLW-Worthington protested the application of the Cuban Assets Control Regulations (CACR) regulations as a violation of Canadian sovereignty because of the possible delay that applying for a Treasury license could cause. *Id.* at 86-87. The Canadian government stated:

The Canadian government holds that the Cuban Assets Control Regulations of the U.S.A. should not be given effect in Canada through the parent-subsidiary relationship or in any other way . . . the Canadian Government wishes to emphasize the significance of this issue and to urge the U.S.A. Government to remove on an urgent basis any restraint on the directors or officers of MLW-Worthington, who are also U.S.A. citizens, which might interfere with the proposed sale of the Canadian company.

*Id.*

MLW-Worthington completed the contract without U.S. approval and over the objection of two U.S. directors. The United States eventually granted a waiver for the sale, but this was apparently connected with a similar problem that the United States was having with Argentina. Argentine executives of two U.S. foreign automobile subsidiaries, Ford and Chrysler, traveled to Cuba during the early part of 1974 to negotiate a possible sale. The Argentine government stated that it would consider any United States attempt to block the sale a violation of Argentine sovereignty. Argentina threatened to nationalize the plants involved and to proceed independently to fulfill the contract. The United States responded by granting Argentina a special license, in the interest of good relations with Argentina.

The United States again deferred to foreign pressure during a third incident, the Litton affair. Late in 1974, a Canadian subsidiary of Litton Industries, a U.S. corporation, asked whether the Treasury Department would prohibit a proposed furniture contract with Cuba. When the Treasury Department stated that it could deny such an application as violative of the regulations, the U.S. parent company canceled the sale. In response, the Canadian government pressured the United States to allow the sale. The United States again relented.

*Id.* A New York Times reporter notes that French President Francois Mitterrand calls the U.S. blockade "stupid." Craig R. Whitney, *In a Slap at the U.S., Castro Is Given a Warm Welcome in Paris*, N.Y. TIMES, Mar. 14, 1995, at A5. The French have long criticized the American trade embargo, and more than most other Europeans have gone out of their way to show their disregard for it. *Id.* "The U.S.A. has held this country by the throat for decades," Mitterrand is quoted as saying. *Id.* "Strangling this people through this embargo no longer has any sense. *Id.* "It no longer represents any threat to world peace, nor any threat to the Americans." *Id.*

North American Free Trade Agreement.”<sup>760</sup> Meanwhile, the blockade has caused strained relations with traditional American allies in Europe and elsewhere as evidenced by the U.N. declaration and pro-Cuba domestic legislation, such as the act passed in Canada.<sup>761</sup> More recently, on September 13, 1995, the Prime Minister of Jamaica, P.J. Patterson, called for an end to the U.S. embargo on Cuba, declaring that “the continued isolation . . . ‘cannot be justified’ in a post-Cold War world.”<sup>762</sup> Even the Pope has come out against the embargo.<sup>763</sup>

Honduran Foreign Minister Mario Carias said Washington sent a letter to the [Honduran] economy ministry warning that much of the property being bought by Honduran investors in Cuba actually belongs to Cuban exiles and U.S. citizens—and is subject to expropriation claims. According to the . . . United States, legal proceedings to recover these properties ‘will be initiated the moment the Fidel Castro regime falls.’<sup>764</sup>

With the more recent passage of the Helms-Burton law, the United States has received criticism of the embargo and its extraterritorial impacts from Japan, the European Union, the fourteen Caribbean countries, the Rio Group of fourteen Latin American countries, Mexico and Canada.<sup>765</sup>

## VI. Analysis

### A. *The U.S.-Cuba Property Rights Dispute*

Settlement of the property dispute with the United States will be a precondition for sustainable development and normalization. One precedent potentially similar to the Cuban case is Nicaragua. That country transferred power from the Sandinistas to the UNO coalition

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760. Banales, *supra* note 715; Bourque, *supra* note 149, at 213-14.

761. For a discussion on how the U.S. embargo has impacted U.S.-Canada relations, see Bell, *supra* note 7, at 95.

762. Gus Constantine, *Jamaica's Patterson Asks End to Cuban Policy*, WASH. TIMES, Sept. 14, 1995, at A11. In a similar statement, President of Venezuela Carlos Andrés Pérez criticized then President Reagan, saying “we must not permit a new confrontation between Cuba and the rest of Latin America . . . we must promote coexistence with a regime [that is] different from ours, but which is an integral part of Latin America.” Yopo H., *supra* note 758, at 1.

763. Greg McDonald & Cecile S. Holmes, *Pope Tells U.S. to be ‘Example’: Clinton Gives Welcome Upon Pontiff's 4th Visit*, HOUSTON CHRON., Oct. 5, 1995 at A1, available in LEXIS, News Library, Hchrn File.

764. *Honduras: United States Warns Against Investing in Cuba*, Oct. 19, 1993, Inter Press Service, available in LEXIS, News Library, Wires File.

765. Swardson, *supra* note 740, at A20; *The Americas: Falling out with Uncle Sam*, *supra* note 740, at 47.

in 1990, ending a decade-long civil war and beginning a process of reconciliation.<sup>766</sup> Donors again began to operate there and a U.S. embargo was lifted. However, as time went on, U.S. foreign aid and support for loans to Nicaragua through multilateral institutions (like the International Monetary Fund, the World Bank and the Inter-American Development Bank) were made contingent on resolution of property claims for U.S. citizens.<sup>767</sup> It appears in regard to Cuba, that resolution of the property dispute may be a precondition to receiving any assistance, rather than a condition for continued aid.

U.S. claims in Cuba approved by the Foreign Claims Settlement Commission in 1972 reflect a concentration of assets among the largest former owners. The top ten corporate claims account for about half of the \$1.8 billion.<sup>768</sup> The top fifteen claims reflect about two-thirds of all claims.<sup>769</sup> Most of these expropriated properties have not been subject to improvements, nor have they been parceled.<sup>770</sup> Therefore, some former owners view recovery of the original asset as a real source of compensation.<sup>771</sup> It has not been determined what impact UBPCs are having in conserving the original confiscated parcels.

So far the approach to the property dispute has been characterized by polarization, posturing, and politicization.<sup>772</sup> To date, little has

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766. *Nicaraguan Property Disputes*, *supra* note 753, at 1.

767. *Id.* at ii (preface).

768. Top claimants include the following: Cuban Electric Company (\$267.6 million), International Telephone and Telegraph (\$130.7 million), North American Sugar Industries (\$100.9 million), Moa Bay Mining Company (\$88.3 million), United Fruit (\$85.1 million), West Indies Sugar (\$84.9 million), American Sugar (\$81.0 million), Standard Oil (\$71.6 million), Bangor Punta Corporation (\$53.4 million), and Francisco Sugar (\$52.6 million). See Rolando H. Castañeda & George Plinio Montalván, *Economic Factors in Selecting an Approach to Expropriation Claims in Cuba*, in *Cuba Transition Workshop*, *supra* note 119, at 4.

769. The 11th through 15th companies included Texaco (\$50.1 million), Manatí Sugar (\$48.6 million), Nicaro Nickel Company (\$33.0 million), Coca-Cola (\$27.5 million), and Lone Star Cement (\$24.9 million). *Id.*

770. *Id.*

771. *Id.*

772. For example, U.S. Congressman Lincoln Díaz-Balart, a Republican from Florida, issued a press release denouncing Cuban foreign investment legislation as "an immoral farce" the day after it was passed. See Lincoln Díaz-Balart, *Díaz-Balart Denounces Castro Foreign Investment Farce*, in *Cong. Press Releases* (Sept. 6, 1995), available in LEXIS, News Library, Hillpr File. That press release cites Yanik Fenton as the contact person for information. *Id.* On September 11, 1995, the author contacted Ms. Fenton regarding the announcement. According to her, neither the Congressman nor any member of his staff had a copy of the new law, nor had any of them seen it. Telephone Interview by Steven E. Hendrix with Yanik Fenton, advisor to Congressman Lincoln Díaz-Balart (Sept. 11, 1995). However, Ms. Fenton insisted the law was a "farce" and did not see any reason why the

been done to explore technical approaches or the adequacy of property records to verify ownership as a prerequisite for dispute resolution. Also, closer examination of past compensation by Cuba to other countries, and how such amounts were calculated, will be essential. The following questions must be answered: Was that process viewed as fair? What was the level of compensation? How was compensation calculated? Was any interest paid? How did those settlement arrangements compare with those granted by the Czech and Slovak Republics? Hungary? Poland? Russia? Nicaragua? To date, these analyses have been done largely in the abstract, rather than by technical comparison of the present state of Cuba disputes with these other experiences.

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Congressman needed to read the law to come to that conclusion. *Id.* After all, she reasoned, Cuba is Communist. *Id.*

As points of comparison, Honduras paid between 2% and 6% per annum over 15 to 25 years. *See* Agrarian Reform Law, Decree Law No. 120 art. 67 (G.O. 21,564, Aug. 2, 1975) (Hond.). Bolivia was required to pay 2% over 25 years. *See* Agrarian Reform Law, Decree Law No. 3464 art. 156 (Aug. 2, 1953) (Bol.). In fact, in Bolivia no official compensation was ever paid nor have any agrarian bonds been issued. *See* Ronald J. Clark, *Agrarian Reform: Bolivia*, in *LAND REFORM IN LATIN AMERICA* 129, 138 (Peter Dorner ed., 1971). Peru used 4% to 6% over 20 to 30 years. *See* Decree Law No. 17716 art. 174, Supreme Decree No. 877 (July 18, 1979) (Bol.). Chile paid in bonds over 25 to 30 years. *See* Thome, *supra* note 301, at 197. Other Latin American countries had similar programs.

In comparison, the Italian land reform program of 1947 called for compensation with 25 year bonds at five percent interest. *See* VICENTE CASANOVA, *supra* note 55, at 126. In Peru, Bolivia, and elsewhere, the law on the books might have called for compensation, but in practice there were cases of de facto takeovers of property, with the former owner never receiving any indemnification or even due process. In fact, Bolivia, has offered no official compensation nor ever has issued any bonds. *See* Clark, *supra*, at 138. In other countries, for those that did receive compensation, the fixed rates of interest were often eroded with inflation. Bonds often have traded at a fraction of face value, reflecting the discount for political and economic risk. Cuba's case should be understood in this broader, regional context of similar experiments with agrarian reform.

General Fulgencio Batista's 1952 coup partially suspended the 1940 Constitution and constituted an extraconstitutional assumption of power. *See* Fernando L. Torres Ramirez, *Comentarios e Impresiones de Algunas Instituciones y Normas Jurídicas de la República de Cuba*, 28 *REVISTA DE DERECHO PUERTORRIQUEÑO* 2, 3 (1988); Gutiérrez, *supra* note 119, at 2-3. One author argues that acts after March 9, 1952 and before 1959 are prima facie invalid because the constitutional process was not followed. *See* Nestor Cruz, *Legal Issues Raised by the Transition: Cuba from Marxism to Democracy*, 29 *COMP. JURID. REV.* 68, 74 (1992).

A group of Cuban jurists living in exile maintain that the 1940 Constitution is still in effect and bases this argument on the procedure used in replacing the old constitution with the new constitution through 1959 Fundamental Law. *Compare* Consuegra-Barquín, *supra* note 109, at 898-99 with Travieso-Díaz, *supra* note 24, at 237-38 (noting that it is "generally accepted that a successful revolution has the power, under certain conditions, to annul the existing constitution and create new fundamental law") (citing law in Pakistan, Canada, Ghana, Lesotho, and Trankei). *See also* Baerg, *supra* note 105, at 247.

STEREOTYPED <sup>773</sup> LEGAL POSITIONS: CUBA VS. UNITED STATES ON THE MAJOR CONTENTION POINTS.		
Issue:	Cuba:	United States:
Was adequate compensation offered?	Yes. Cuban agrarian reform bonds paid 4.5% interest over 20 years, compared to bonds issued under Gen. Douglas MacArthur's agrarian reform in Japan, which paid interest at 2.5% over 24 years.	No. Expropriation demands compensation at fair market value. Even in comparative Latin American terms, the Cuban agrarian reform did not compensate former owners as other countries did in carrying out their agrarian reforms.
Was adequate compensation actually paid?	The law contemplated funding compensation out of U.S. sugar quota purchases. As this was discontinued, the U.S. ended the funding mechanism for compensation.	No. Cuba structured its repayment mechanism knowing the sugar quota had already been canceled.
What is the value of claims outstanding?	U.S. figures should be discounted due to damages and losses inflicted on the Cuban economy by the U.S. This includes the blockade. Further, any settlement should recognize and reflect the price paid by workers who lost their properties to the Batista officials who took their lands illegally in the years 1952-1959. N.B.: U.S. claimants have sometimes taken deductions from their taxes for losses in Cuba. Additional compensation at this point could mean double payment.	The Cuban claims program of the Foreign Claims Settlement Commission reviewed \$816 claims, certifying 5,911 (\$1.8B), denying 1,195 (\$1.5B), and dismissing 1,710. FCSC decided that a statutory simple interest rate of 6% should be used, although the Cuban Claims Act did not specify a rate.

773. The word "stereotyped" is used intentionally in the chart's heading. These are not the official positions of either government. However, this chart does attempt to summarize possible anticipated positions. The Cuban position is summarized by Olga Miranda, Vice President of the Cuban Society of International Law. See Miranda, *supra* note 757, at 32; see also Travieso-Díaz, *supra* note 24, at 235; Consuegra-Barquín, *supra* note 103, at 893.

Were takings legal in the first place under the 1940 Constitution?	Yes, as the Constitution forbade large estates and insisted on the "social function" of land. Regional jurisprudence approved agrarian reform legislation. Indeed such an approach had the backing of the U.S. Alliance for Progress in the 1960s. Changes made to the 1940 Constitution via the Fundamental Law allow for the takings of property, especially those inconsistent with the social function.	No, because takings require compensation and due process.
Was the Fundamental Law a valid constitutional change?	Yes. The 1940 Constitution had been abrogated by Batista who assumed the presidency in violation of the Constitution. The revolution sought to restore the rule of law. Indeed, the Cuban Supreme Court held the 1959 Fundamental Law to have succeeded the 1940 Constitution. Further, the agrarian reform law provisions are consistent with the 1940 Constitution. Thus, the agrarian reform was a constitutional act, whether the 1940 Constitution or the 1959 Fundamental Law applies.	No. The Fundamental Law was announced in a manner inconsistent with the way in which the 1940 Constitution specified that amendments or changes were to be made. The 1940 Constitution was never effectively repealed and the Fundamental Law and subsequent constitutions are invalid because they did not conform to the procedures described in Articles 285 and 286 of the 1940 document. Laws deriving their authority from the Fundamental Law are thus invalid.

In the end, the political will of the parties, rather than the strength of their legal claims, will decide the actual settlement; legal arguments will only be bargaining chips. In Mexico, the government carried out an ambitious agrarian reform and expropriated vast amounts of property, especially U.S. investments in the petroleum sector, without resulting in an embargo.<sup>774</sup> In Eastern Europe, lump sum agreements were offered to many countries shortly after the fall

774. Regarding the Mexican case, one author writes:

To this day Cardenas represents the promise of a "Mexico for the Mexicans." By the end of his administration, the role of foreign capital had diminished substantially: in 1940 total direct foreign investment in Mexico was under 500 million dollars, less than one-quarter of most estimates for the 1920s. "Of the four areas traditionally dominated by foreign capital—railroads, oil, mining, and electric power—foreign control had been eliminated from the first two. Foreign enterprise still controlled the mining and electric power industries . . . but even in those fields the amount of foreign capital had been reduced.

of the Berlin Wall, allowing those governments to cash out claims.<sup>775</sup> Like Cuba, Nicaragua suffered an embargo. More recently, it has had to pay individual claims on a case by case basis, with the United States demanding fair market value for all its citizens, past and present.<sup>776</sup> The deal Cuba receives will depend mainly on the politics of that moment.

Much of the focus so far has been on Eastern European models as precedent for any future compensation program leading to normalization. Yet the Cuban agrarian reform contains many of the same provisions that many Latin American reforms have had: the social function of land, restrictions on alienation, and preference for cooperative structure.<sup>777</sup> The United States has categorized Cuba with Eastern Europe, thinking of Cuba as a state that is tied to Russia. U.S. authors have largely ignored many relevant models closer to home and more similar in structure and history to the Cuban case. Peru, Bolivia, Mexico, Venezuela, Colombia, El Salvador, Chile, Nicara-

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Cardenas's last two years in office brought "severe economic difficulty."

Several factors—among them, the expropriation of the oil industry, bitter counterattacks in the press by foreign companies, and retaliatory economic sanctions against Mexico . . . .

Amy L. Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223, 230-31(1995) (citations omitted).

775. For example, Hungary paid about \$20 million to the United States to settle all outstanding claims with U.S. citizens, however, this payment was largely symbolic. See Laszlo Takacs, Embassy of Hungary, Presentation at the Organization of American States (Washington, D.C., Sept. 18, 1992).

776. At the time of Nicaraguan President Chamorro's inauguration, less than 20 U.S. citizens had filed property claims with the U.S. government. *Nicaraguan Property Disputes*, *supra* note 753, at 3. In 1995, the State Department had over 600 persons claiming 1631 properties on file. *Id.* at 2. Only 501, or 31%, of those properties were owned by U.S. citizens at the time of expropriation or confiscation. *Id.* The remainder were owned by Nicaraguans who subsequently became naturalized U.S. citizens. *Id.* at 3. Claims were approved by the United States in 1972, capping the number of outstanding claims against claims and making the problem more manageable. *Id.* However, a Nicaragua-like result could occur in Cuba with the bill introduced in the U.S. Congress, which provides relief sought by new Cuban Americans. Travieso-Díaz, *supra* note 24, at 223. The LIBERTAD Act, amends the Cuba Claims Act to allow U.S. citizens to file expropriation claims against Cuba whether or not the claimants were U.S. citizens at the time of expropriation. *Id.* It would also enable any U.S. citizen whose property was confiscated to bring action in U.S. district courts against any third country person or government that "traffics" (defined as "sells, transfers, distributes, dispenses, purchases, receives, possesses, obtains control of, manages, uses, or disposes of") the expropriated property. *Id.* (citing Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995, 5,381, 104th Cong., 1st Sess., §§ 4(7), 302, 303 (1995)).

777. The concept of "land to the tiller" is found in Article 24 of the 1992 Cuban Constitution. 1992 CONSTITUTION art. 24.



gua,<sup>778</sup> the Dominican Republic, Puerto Rico, Honduras and others should be reviewed in terms of their historic compensation methods, bond structures, and other features. If much of the text of the Cuban reform is repeated in these other countries, perhaps a balanced solution can be found in Cuba as well.

### **B. Privatization**

Opening industry and agriculture to the private sector appears necessary, based on comparative experiences in other countries. Irene Philippi, Senior Economist at Polyconomics, Inc., argues that a quasi-privatization process "can be said to have already begun, with the emulation of the successful Chinese conversion of its farming communes to democratically run cooperatives." According to Philippi,

[T]he process could be enhanced by relinquishing even more power over policy decisions at the co-ops from the center, which appears to [her] to be the real key to China's success in agriculture. Privatization of large enterprises should not be rushed. Shock therapy has not succeeded in Russia or Eastern Europe, and there is no reason to believe that hurling Cuba into the 'free market abyss' could be accomplished with better results. A new economy should be built parallel to the old, enabling the new to replace the old over time. Asset values should be permitted to reflect the declining political risk and improving business climate before these companies are sold. In this way, the people of Cuba will reap the value of Cuban properties, rather than seeing them squandered in hard currency sales to foreign speculators.<sup>779</sup>

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778. Nicaragua has sometimes been explored, perhaps in the belief that the Sandinista government was a "Communist" one. Yet, like Cuba, Nicaragua's reform package reflected much more influence from Mexican, Chilean, Bolivian, Peruvian, Cuban, and Colombian agrarian reform legislation than from Russia.

779. Philippi Testimony, *supra* note 755, at 29. For a lengthy discussion of the privatization process in China regarding agricultural properties, see Transition of China's Rural Land System 151, Land Tenure Center Paper (May 1995) (paper on file with the Land Tenure Center Library, University of Wisconsin).

One commentator wrote that:

Whether or not the Chinese model should be an antidote or an alternative to 'shock therapy,' its success at the very least indicates that before countries such as Vietnam, Cuba, North Korea, Russia and others from the ex-Soviet Union become the testing grounds for 'shock therapy,' this all-too-common prescription for ailing transitional economies should be subjected to further scrutiny.

Lan Cao, *The Cat that Catches Mice: China's Challenge to the Dominant Privatization Model*, 21 BROOK. J. INT'L L. 97, 178 (1995). GERALYN PYE argues that Cuba looks to China and Vietnam as examples in its modernization process. See Pye, *supra* note 412, at 7, 10.

Others point to Chile's relatively successful conversion from market intervention to free market principles. In that country, the change was accompanied by accelerated economic growth. This would support a faster, more dramatic privatization, more in conformity with standard International Monetary Fund (IMF) prescriptions for privatizing. In short, Cuba will have to decide whether an incremental, slow path to privatization is better, as in the Chinese model, or if a quicker pace would produce better results, as in Chile.

In discussions of private versus public ownership, it should be noted that empirical studies in Cuba have failed to provide a comprehensive comparison of private versus public sector productivity.<sup>780</sup> The state has been the dominant factor in agricultural production.<sup>781</sup> During the first years of the Revolution, French agronomist René Dumont found that the newly created state enterprises were overly large, poorly organized and managed, and wasteful.<sup>782</sup> He was unimpressed with Cuba's private sector as well.<sup>783</sup> In more recent times, government officials have maintained that economies of scale and centralized planning would facilitate the introduction of capital-intensive technological innovations.<sup>784</sup> Yet, it is clear that state farms suffer from poor management and a lack of incentives for workers in the fields.<sup>785</sup>

### C. Registry and Cadastral Reform

A literature review has uncovered no reviews or evaluations of registry or cadastral systems in Cuba. This is alarming for many reasons. First, normalization of relations with the United States depends, in part, on resolution of property disputes. To the extent accurate property records are needed to address this issue, a diagnostic of registry records will be needed. Any dispute resolution strategy should depend on the perceived reliability and precision of the existing records.<sup>786</sup>

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780. Nancy Forster, *Cuban Agricultural Productivity*, in CUBAN COMMUNISM, *supra* note 139, at 196, 202.

781. *Id.* at 201.

782. *Id.*

783. *Id.*

784. *Id.* at 200.

785. *Id.*

786. For a similar but more detailed discussion of this same point in Venezuela, see Steven E. Hendrix, *Tenure Insecurity in Venezuela: Empirical Data on the Failure of Cadastral and Registry Systems in the Reformed Agrarian Sector*, 55 SURV. & LAND INFO. SYS. 92, 92-98 (1995).

More generally, free market systems are based on private property ownership. Registries are where interests in real estate property are recorded. If the registries are in order, any transition toward a market economy will go more smoothly than if they are in disrepair. In this sense, registries are usually the requisite informational infrastructure of market-oriented development strategies that include massive foreign investment and tenure security.

In the longer term, if Cuba wishes to convert from its *folio personal* system to a parcel-based system, like the *folio real*, it will need up-to-date survey data.<sup>787</sup> This same information will be required to establish the base layers of any future multipurpose cadastre. The strategy for modernization of land records management will depend in large measure on the existence of and level of confidence in current records. This subject demands immediate attention.

Finally, it is perhaps axiomatic that tenure security is vital for investment.<sup>788</sup> Consequently, the Cuban government should try to avoid insecurity of ownership. Yet, in any reversal of present policy in Cuba, that is precisely what might happen. In Bolivia, for example, R.J. Clark writes:

Many current land conflicts between peasants and ex-landlords have arisen because of confusion and inefficiency in the expropriation process. . . .

In many situations, peasants harbor resentment and feel very insecure vis-à-vis the landlord. They remember the power of the landlord in the pre-reform period, and many fear that he will be able to take their lands because they do not yet have clear title.

Landlords often exploit and foster this uncertainty by threatening to repossess their land and by telling the peasants they will never get titles, especially now that ex-President Paz Estenssoro is out of power. In a few cases landlords have disguised peasants and urban residents as soldiers or police and sent them to demand payment for land to which they no longer have legal rights. Sometimes

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787. The regional tendency is towards parcel-based systems. The following countries either have or are moving to the *folio real* system (or land registration, if under the British system, rather than the civil code): Belize, Trinidad and Tobago, Guyana, Barbados, Costa Rica, El Salvador, Nicaragua, Guatemala, and Jamaica, among others.

788. In Nicaragua, the IMF believes investment has failed to return to the country due to tenure insecurity resulting from the removal of the Sandinistas from power. Current owners wonder whether they will be kicked off their land. Former owners seek return of assets or indemnification. While there is indecision, there is no investment. See William C. Thiesenhusen & Steven E. Hendrix, *Poverty and Progress: The Cases of El Salvador and Nicaragua*, 17 HARV. INT'L REV. 16, 19, 59-61 (1995); J. David Stanfield and Steven E. Hendrix, *Ownership Insecurity in Nicaragua*, 22 CAP. UNIV. L. REV. 935, 939-51 (1993).

the peasants, confused and bewildered after waiting so long for land titles, are willing to agree to almost anything. As a result, some peasants have purchased their own land—sometimes at inflated prices—in search of the security that a vigorous program of title distribution and enforcement could have provided.<sup>789</sup>

Such a result should alert the Cuban government and international donor assistance agencies. Like Bolivia, confusion or informality in the original expropriation process, combined with later lack of titling, may later result in tenure insecurity for current landholders.

#### *D. Tenure Policy and Sustainable Development*

A broad tenure policy to promote long-term sustainable development will be critical, especially in the early stages of any new market-oriented initiative. Cuba still suffers from inefficient land use and deficient land access for the resource poor. National and international investors will need institutional confidence in the land management system before investing the massive amounts of money Cuba will need to strengthen its economy and put people to work. In this regard, a well-articulated land tenure strategy will be crucial. Such a strategy could include land market activation, land and mortgage banks, property taxation, registry and cadastral reform, zoning, land use planning, and privatization. New property legislation should also be considered to promote investment while streamlining and simplifying the process.

Nevertheless, Cuba must be attentive to both public and private needs. A balance of these interests should be explored. This should provide sufficient tenure security to owners, while allowing the government flexibility in environmental regulation,<sup>790</sup> eminent domain, and other historic state interests.

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789. Ronald J. Clark, *Problems and Conflicts over Land Ownership in Bolivia*, 22 *INTER-AM. ECON. AFFAIRS* 3, 6-7 (1969) (reprinted as LTC Reprint No. 54, on file with the Land Tenure Center Library, University of Wisconsin). Elsewhere, Clark writes that in one case, land was not worked for fourteen years after the agrarian reform. Clark, *supra* note 772, at 143. The former landlord was particularly abusive and still wanted the peasants to work his remaining land for him under the pre-reform system. *Id.* The era was noted for confusion rather than tenure security. *Id.*

790. Advancement of environmental law often conflicts with privatization goals. See, e.g., Theodore S. Boone, *Environmental Regulations and the Privatization Process* (unpublished manuscript presented at the American Bar Association, Section of International Law and Practice). On the other hand, low incentives for resource conservation that characterize state farms in Cuba are leading to rapid reduction in the stock of soil resources. See Héctor Sáez, *Technology, Institutions, and Land Degradation: A Case Study of Santo Domingo, Cuba*, Presentation at LASA Meeting, *supra* note 412, at 1.

## VII. Conclusions

This Article has provided a legal history of recent Cuban property law, highlighting expropriations and confiscations since 1959, the dispute with the United States, and the general agrarian reform structure. In many respects, the Cuban agrarian reform and property confiscations are similar to other regional tenure changes and should be understood in this context. While the rhetoric may have focused on East-West stereotypes, Cuban agrarian reform legislation is representative of the Latin American and Caribbean region.

While other articles have focused on the lack of compensation, few authors have noted that many of the lands now claimed by U.S. citizens were actually banned by the 1940 Constitution, which outlawed large estates. Perhaps the rhetoric clouded earlier reviews of the merits of these cases. Still, it appears that even the Cubans recognize some compensation remains due, as they have settled with all other countries to which indemnification was owed.

Today, a U.S. embargo continues against Cuba, due in part to the property claims of U.S. citizens. Castro's government expropriated property under dubious conditions with little compensation. Yet, as has been shown, just fifteen claimants represent about two-thirds of all claims in dollar figures. It may well be that the vast majority of these claimants have already received compensation in the form of tax deductions in the United States and any further indemnification would amount to double payment. It remains an open question whether the estates were lawfully confiscated under prerevolutionary law. Further, these investors invested in Cuba knowing the risks while making handsome profits. Should U.S. foreign policy now be tailored to a special interest group of former large estate holders and political opponents? Such an approach perpetuates the Cold War ideology and runs counter to U.S. interests in positive engagement with the Cuban people for peace, democratization, and economic growth. It also denies U.S. investors opportunities in agriculture, tourism, pharmaceuticals, and other attractive industries in Cuba, while injuring Cuba's poor and disadvantaged the most.

Based on this initial description of Cuba's property law, it is hoped policymakers can approach tenure policy in a more technical and nuanced fashion, providing opportunities for more scientific, less political solutions. It is fully recognized that tenure policy has become so politicized that final resolution will depend on Cuban and U.S. politics; still, tenure policies to address compensation or privatization mat-

ters should not lose sight of the longer term development goals of the island nation. Such interests should be taken up in a tenure strategy that promotes sustainable development and participatory growth.

